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TREATISE

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ON THE

LAW OF INLAND CARRIERS.

BY

EDMUND POWELL, ESQ.,

OF LINCOLN COLLEGE, OXFORD, ^{B.A.} M.A., AND OF THE INNER TEMPLE AND
WESTERN CIRCUIT, BARRISTER-AT-LAW,

Author of "A Treatise on the Principles of Evidence."

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P R E F A C E

TO

T H E S E C O N D E D I T I O N .



THIS second edition has been revised carefully, and substantially re-written. The two chapters on the Railway and Canal Traffic Act, 1854, are quite new: and they contain, I hope, a correct analysis and summary of the intricate cases which have arisen under that statute. I have omitted, or shortened, much of the first edition, which I thought to be either obsolete or superfluous: and, by this means, I have been able to reconstruct, and modernize, this treatise without enlarging it materially. I have only to add that I have endeavoured to make it a scientific and practical work, as well as a trustworthy and complete digest of cases.

E. P.

THE TEMPLE,
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P R E F A C E
TO
T H E F I R S T E D I T I O N.

FEW branches of the Law involve questions of more daily practical interest and importance than the Law of Carriers ; and yet it is a branch which, hitherto, has attracted little systematic treatment by any member of the Profession. The American treatise, by Mr. Angell, is the only modern work on the subject ; and it is deservedly a work of high authority in the Courts. But the last edition of it was published many years since ; and the multitude of cases, which have been decided subsequently in the English Courts, appeared to call for a new digest and treatise. Many also of the Common Law principles, which are recognized in the American Courts, have been either modified in England, or altogether varied by the legislature. In this treatise, therefore, the author has attempted to supply a patent deficiency in Law libraries, and to give the consolidated results of the latest acts of Parliament and decisions of the Courts.

E. P.

THE TEMPLE,
January, 1856.

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A TREATISE
ON
THE LAW OF CARRIERS.

CHAPTER I.

PRELIMINARY VIEW OF THE LAW OF BAILMENTS.

THE law of carriers is a branch and an extension of the law of bailments.

Bailment is derived from the French *bailler*, to deliver: and a bailment is a delivery of a chattel to another, on trust, for custody, use, elaboration, pecuniary security, or carriage; with the express or implied condition that, after the trust shall have been fulfilled, the chattel shall be re-delivered to the bailor, or otherwise dealt with according to his request. A bailment has also been defined to be a delivery of a thing in trust for some special purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust (*a*). It is this trust which constitutes the essence of every contract of bailment; and hence, in all alleged breaches of bailment, the first, and generally, the only question is, whether the bailee, in the conduct of his trust, has committed fraud or negligence, either in law or fact. It is this principle also which distinguishes the possession of goods, under a contract of bailment, from a possession by finding. Thus, according to an old authority:—"When one comes to the posses-

(*a*) Story on Bailments, s. 2.

sion by bailment, then he is chargeable by force of the bailment; and if the bailee casts them away, or they are taken out of his possession, then he is chargeable to the bailor by force of the bailment; but otherwise it is when one comes to goods by finding, for then he is chargeable by reason of the possession; and if they be out of his possession lawfully, before he who has the right to them brings the action, he is not chargeable (*b*)."

The principles of the law of bailments are laid down in the leading case of *Coggs v. Bernard* (*c*) by Holt, C. J. Of the five classes, into which he distributes them, it is only necessary, for the purposes of this treatise, to notice the fourth, which he terms *Locatio operis faciendi*, and the fifth, *Mandatum*. The latter form of bailment contains the first principles of the law of carriers, and will therefore be noticed first.

1. MANDATUM.

Where Goods are bailed, for work to be done in respect of them, to a person who is to have nothing for his trouble.

In this case, although no action will lie for the nonperformance of the contract, because it is *nudum pactum*, and not founded on valuable consideration—yet the bailee will be liable if he enter on the performance of it, and misconduct it. This was the case in *Coggs v. Bernard*. There the declaration was for the damage, *in transitu*, by the defendant's negligence, of goods belonging to the plaintiff, which, it was stated, the defendant had promised to convey safely; and, after a verdict for the plaintiff, it was moved, in arrest of judgment, that the declaration was bad, because it did not aver that the defendant was a common porter, nor that he was to have anything for his pains. But it was held that, although the declaration would have been bad if it had merely disclosed an unperformed contract on

(*b*) Fitzherbert, J., Year Book, 27 Hen. 8, fol. 13, p. 55; cf. Reeve v. Palmer, 28 L. J. 168, C. P. Sc. Cam. (c) Lord Raymond, 900; 1 Smith's Leading Cases, 147, 4th ed.

the part of the defendant; yet, that, since it also showed that the defendant had actually entered on the performance, his assumption of office, coupled with the confidence reposed in him by the plaintiff, created an obligation to employ diligent management, and a liability for negligence; and that, at the same time, it exempted the bailee from every liability, excepting such as might arise from conscious and wilful negligence. Thus a mandatory of animals is bound to feed and take due care of them, during the bailment; and *à fortiori* the same rule applies to bailees for hire (*d*). But a gratuitous bailee of this class is in the same position as a gratuitous bailee with whom goods are deposited for safe custody. He is bound to employ only slight or moderate care, such as will exonerate him from the charge of wilful negligence; and he is liable for nothing less than gross negligence. Such, at least, appears to be the correct modern view of the law (*e*); and therefore the statement of Holt, C. J., that a bailee of this class is bound to employ diligent management, must be regarded as somewhat exaggerated. Mere nonfeasance creates no liability in a bailee of this class; nor will mere misfeasance, unless the circumstances establish in the minds of the jury such negligence as they consider wilful, and therefore gross (*f*).

Hence it appears that the policy of the law of bailments is to regulate the liability of the bailee by the amount of benefit which he derives from the trust. Where the benefit is wholly on the side of the bailor, and the bailee has nothing for the trouble of custody or performance, the law, in accordance with natural equity, holds the bailee bound to employ such carefulness only as will fairly exonerate him from the charge of wilful, or gross, negligence (*g*). He

(*d*) Si un cheval soit bail a un homme a garder, et apres il ne lui donne sustenance, p. q. il mourust, action sur le cas gist.—Hil. Term, 2 Hen. 7, 9 B.; see Addison on Contracts, 847; cf. Rooth *v.* Wilson, 1 B. & Ald. 59.

(*e*) 1 Smith, L. C. 183 n.

(*f*) Wilson *v.* Brett, 11 M. & W. 113; Balfe *v.* West, 13 C. B. 466; 22 L. J. 175, C. P.

(*g*) Doorman *v.* Jenkins, 2 Ad. & El. 256.

is not bound to perform a gratuitous contract; but, if he enter on the performance of it, he must not carelessly betray the confidence of the bailor. Where, on the other hand, the benefit is solely with the bailee, as where goods are lent to him gratuitously for his convenience, common justice as manifestly requires that he should employ the strictest diligence, and be liable for the least avoidable negligence (*h*).

2. LOCATIO OPERIS FACIENDI.

Where Goods are bailed to a person for work to be done on, or in respect of them, for reward.

The law of carriers branches out principally from this class of bailment. Holt, C. J., in describing it in *Coggs v. Bernard*, says: "As to the fifth sort of bailment, viz. a delivery to carry, or otherwise manage, *for a reward to be paid to the bailee*, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of a common carrier, common hoyman, master of a ship, &c. The law charges this person *thus entrusted to carry goods against all events but acts of God and of the enemies of the king*. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be disco-

(*h*) *Blackmore v. B. and Exeter* Q. B.; *McCarthy v. Young*, 3 L. T. Railw. 8 E. & B. 1035, 27 L. J. 167, Rep. N. S. 785.

vered. And this is the reason the law is founded on that point."

The extraordinary liabilities to which common carriers are liable are beyond those which belong to other bailees under this class: for the general duty of such a bailee only obliges him to employ an ordinary and average degree of diligence, to preserve the goods or work intrusted to him, against ordinary and extraordinary casualties. For the rule is "that he is only to do the best he can; and if he be robbed, &c. it is a good account (*i*)."

But he must take at least as much care of the goods as he would take of his own. Thus a watchmaker, to whom a chronometer was entrusted to be repaired, and who deposited it in his shop, where he allowed his servant to sleep, was held liable for a larceny of it by the latter (*k*), because the watchmaker had deposited his own watches in a more secure place than that in which he had deposited the chronometer. A bailee of this class will also be liable for a loss which has been caused by a want of due care or diligence on his part.

Where the bailment is for the mutual benefit of the bailor and bailee; as where the bailor delivers goods to be worked upon or carried; and a reciprocity of profit arises from the execution of the work, and the payment of reward to the bailee; the mutuality of the benefit creates in the bailor the obligation to remunerate the bailee, and binds the latter, not merely to take such care of the goods as he would of his own, but also such average and ordinary care as a prudent man would take of them.

No clear distinction has been drawn yet between the different degrees of legal negligence; and the consequence has been a large amount of verbal controversy. It has been said by Story, J., after Sir William Jones, that "there are infinite shades of care or diligence, from the

(*i*) Holt, C. J., *Coggs v. Bernard*, 23 L. J. 217, Q. B.

1 Smith, L. C. 159; cf. notes, 172; (*k*) *Clarke v. Earnshaw*, Gow, 30. *Dansey v. Richardson*, 3 E. & B. 144;

slightest momentary thought to the most vigilant anxiety There may be a high degree of diligence, a common degree of diligence and a slight degree of diligence Common or ordinary diligence is that diligence which men in general exert in respect to their own concerns. It may be said to be the common prudence which men of business, and heads of families, usually exhibit in affairs which are interesting to them. Or, as Sir William Jones has expressed it, it is the care which every person of common prudence, and capable of governing a family, takes of his own concerns. It is obvious that this is adopting a very variable standard; for it still leaves much ground for doubt as to what is common prudence, and who is capable of governing a family. But the difficulty is intrinsic in the nature of the subject, which admits of an approximation only to certainty. Indeed, what is common or ordinary prudence is more a matter of fact than of law. And in every community it must be judged of by the actual state of society, the habits of business, the general usages of life, and the dangers as well as the institutions peculiar to the age (*l*).” Accordingly it is for juries, in their discretion, to say, according to the circumstances of each case, whether the course pursued by the defendant has been such as a prudent man would have pursued under the same circumstances (*m*).

Similarly, English judges have declined to draw, and even to recognize, any practical distinction between ordinary negligence and gross negligence (*n*). Thus Lord Denman (*o*) has “doubted whether between gross negligence and negligence any intelligible distinction exists;” and Rolfe, B. (*p*) has said that he “could see no difference between negligence and gross negligence—that it was the same thing, with the addition of a vituperative epithet;” and that

(*l*) Story on Bailments, s. 11.

(*o*) Hinton v. Dibbin, 1 Q. B. 661.

(*m*) Vaughan, J., 3 Bing. N. C. 477.

(*p*) Wilson v. Brett, 11 M. & W.

(*n*) Parke, B., Wyld v. Pickford, 115; cf. Erle, J., 28 L. J. 335, Exch. 8 M. & W. 461.

in the case of injury to a chattel by a gratuitous bailee, the proper question for the jury is, whether, on a survey of all the circumstances, the defendant has been guilty of *culpable* negligence (*q*). This appears to be the most satisfactory authority and test in every case of loss or damage to a bailor: and the simple and uniform question for the jury will then be, whether, on a due consideration of all the facts, and of the relative duties and liabilities of bailor and bailee—according as the bailment is gratuitous, or for reward—the bailee has been guilty of culpable negligence.

Thus an agister, who agrees for reward to take care of and re-deliver cattle to the plaintiff (*r*), is liable if he leave the gate of his field open, and the cattle stray out and are lost (*s*). In the latter case Gibbs, C. J., said: "All the defendant is obliged to observe is reasonable care. He does not insure, and is not answerable for the wantonness or mischief of others. If the horse had been taken from his premises, or had been lost by accidents which he could not guard against, he would not be responsible If there were a want of due care and diligence generally the defendant will be liable Did he apply such a degree of care and diligence to the custody of the horse as the plaintiff who entrusted the horse to him had a right to expect? I shall leave it to the jury."

Accordingly, if there be no want of ordinary diligence in the bailee, he is not liable for either loss or damage. Thus, in *Clark v. Earnshaw*, the defendant not only suffered his servant to sleep in the shop where the plaintiff's chronometer was left, but he had removed a large number of his own watches to a safer place; and this combination of facts was held by the jury, on the question of the court, to prove a want of ordinary diligence in the defendant. But where the property is stolen by a servant, without such delinquency on the part of the bailee, the

(*q*) Cf. *Beale v. S. D. Railw.* 29 L. J. 444, Exch.

(*s*) *Broadwater v. Blot*, Holt, 547; cf. *Marfell v. S. W. Railw.*, 29 L. J.

(*r*) *Corbett v. Packington*, 6 B. & C. 315, C. P.

latter is not liable (*t*). So a warehouseman is only bound to take reasonable and common care of any chattel entrusted to his charge (*u*), but he will be liable for manifest negligence; as if goods be damaged owing to the defective state of the machinery by which he receives them into his house (*x*).

(*t*) *Finucane v. Small*, 1 Esp. 315.

(*x*) *Blackmore v. B. & E. Railw.*

(*u*) *Cailiff v. Danvers, Peake*, 8 E. & B. 1035; 27 L. J. 167, Q. B.;
N. P. 155, and notes; see *infra*.

Thomas v. Day, 4 Esp. 262.

CHAPTER II.

ON CARRIERS WITHOUT HIRE, AND CARRIERS FOR HIRE,
WHO ARE NOT COMMON CARRIERS.

*Carriers without Hire.*

THE duties and liabilities of this class are co-extensive with those of mandatory bailees. They are bound to employ only moderate or slight prudence; they are not liable for breach of contract, if they repudiate it before entering on performance; and they are liable for loss or damage to the bailor, only in the event of gross or culpable negligence (*a*). In *Coggs v. Bernard* (*b*), the carriage was mandatory, or gratuitous, on the face of the declaration; and the principle which that case establishes is, that if a man undertake to carry goods, and actually receive them to be carried, the confidence reposed in him by the bailor is a sufficient legal consideration to make it the duty of the bailee to take moderate care of them; and to render him liable for culpable negligence, although he is not a common carrier, and although he is not to have anything for the carriage.

This doctrine agrees with that of the analogous bailment *Depositum*, or gratuitous bailment of goods for safe custody only. This class was described first in *Coggs v. Bernard*, by Holt, C. J.; and in it, since the benefit is exclusively that of the bailor, it is held that the bailee is liable to him only for gross negligence, and not for common neglect. Thus, where the plaintiff had deposited money with the defendant, a coffee-house keeper, for safe custody and without remuneration:

(*a*) *Dartnall v. Howard*, 4 B. & C.

(*b*) *Supra*.

345; *Rooth v. Wilson*, 1 B. & Ald. 59.

and the defendant had placed it with a much larger sum of his own in his cash box in his tap-room; but it did not appear whether the cash box was locked; how far it was a safe place; nor to what class of people it was accessible; and the jury found that the defendant had committed gross negligence; the court held, that the verdict established the plaintiff's case (*c*). In this case, Lord Denman told the jury that it did not follow, from the defendant having lost his own money at the same time as the plaintiff's, that the defendant had taken such care of his money as a reasonable man would take of his own: and this view, which was approved of by the rest of the court, overrules an opposite opinion, which Holt, C. J., delivered in *Coggs v. Bernard*.

Accordingly, where the defendant, a stage coachman, lost a parcel which he had undertaken to carry without hire, Lord Tenterden left it to the jury to say "whether there had been great negligence on the part of the defendant; if there was not great and somewhat extraordinary negligence on his part, the verdict ought to be for him" (*d*). Carriers of this class are held also not to be insurers of the goods, as common carriers are, and are not liable for larceny without negligence, nor for loss by inevitable accident (*e*). Thus, even where common carriers undertook to warehouse goods gratuitously, after the termination of the transit, and until there should be an opportunity of delivering them to the consignee; and the goods were accidentally, and without the fault of the defendants, burned during that interval; the defendants were held to be *pro tanto* gratuitous bailees, and therefore not liable for the loss (*f*). Here the gratuitous bailment was treated as supplementary to, and engrafted on, the contract of carriage.

(*c*) *Doorman v. Jenkins*, 2 Ad. & Ell. 256.

(*d*) *Beauchamp v. Powley*, 1 M. & R. 38.

(*e*) *Nelson v. Mackintosh*, 1 Stark.

237.

(*f*) *Garside v. The Proprietors of the Trent and Mersey Navigation*, 4 T. R. 581.

But where, in a very similar case, the defendant, as a common carrier, had warehoused goods, *in transitu*, according to the plaintiff's original request, and was to be paid for the previous and subsequent carriage, but not for the warehousing; it was held that if he received the goods into his warehouse for the purpose of being carried for hire afterwards, he was not a gratuitous bailee (*g*). The distinction between these two last cases appears to be, that in the former the defendants had performed their contract, and were retaining the goods gratuitously for the convenience and by the supplementary request of the plaintiff, until there should be an opportunity of delivering them; in the latter, the warehousing being intermediate and during the transit, was treated as part of the original contract of carriage; and, although it was expressed that the defendant was not to be paid for the warehousing, it was considered by the court that it was substantially connected with the entirety of the carriage, for which a valuable consideration was to be paid. Still these cases exhibit a conflict of laws. In *Garside v. The Proprietors of the Trent Navigation*, it was also part of the express agreement, that if the plaintiff would employ the defendants to carry, the latter would keep the goods without charge until they had an opportunity of delivering them; and, although Buller, J. grounded his judgment for the defendants on the principle that "the keeping of the goods in the warehouse was not for the convenience of the carrier, but of the owner of the goods;" yet the warehousing at the termination of the transit, and until delivery, seems to have been as much part of the original contract as it was held to have been, during the transit, in *White v. Humphrey*. Both cases, however, are reported very shortly; and, although *Garside v. The Proprietors of the Trent Navigation* was cited in argument in the latter case, it was not noticed by Lord Denman in his judgment. But every principle of public policy is so entirely in favour

(*g*) *White v. Humphrey*, 11 Q. B. 43.

of the latter decision, and the inconvenience and confusion are so manifest which would arise if the liability of a paid carrier could be qualified by the insertion during the bailment of a merely mandatory liability, that there can be little doubt that *White v. Humphrey* would be upheld on error.

It is to be inferred from this case that the courts do not favour the theory of gratuitous bailment, when it is set up as a defence in an action for damage by negligence. It is another instance of the growing disposition of judges to recognize no practical distinction between the different degrees of negligence. There appears, indeed, to be no satisfactory reason, in the principles of jurisprudence, why any should be recognized—why the voluntary good nature which induces a man to offer or consent to a gratuitous kindness should be any excuse for negligence in performing it. The substantial principle of *Coggs v. Bernard* is, that the confidence reposed by a bailor in a gratuitous bailee creates in the latter an obligation to diligent management; and, conversely, it is mere natural justice that he should be responsible, not merely for gross, but also for ordinary, negligence (*h*).

Carriers for Hire who are not common Carriers.

A contract to carry for hire is not necessarily a contract to carry as a common carrier; and the distinction is important, because it is only in the latter case that the law implies a contract of insurance.

Thus, if A., who is not a common carrier, contract to carry goods for B. for hire, he is only a bailee within Holt, C. J.'s definition under the class *locatio operis faciendi*. A. is a bailee for valuable consideration, and is therefore bound to use ordinary diligence, and to avoid culpable negligence, in performing his contract; but he does not insure the safety of the goods in the manner in

(*h*) Cf. *Doorman v. Jenkins*, 2 Ad. & Ell. 256.

which a common carrier, who plies regularly from place to place, is presumed to insure them.

Accordingly, when goods are lost or damaged by a bailee for hire, who has contracted to carry them for valuable consideration, the first object of the bailor is to prove him to be in the position of a common carrier; and then the liability of the carrier becomes an included consequence of his position. If the bailor fail in this endeavour, he may attempt to show that the carrier has specially and expressly insured the safety of the goods. If he fail here also in his evidence, he may still fix a liability on the carrier by proving him to have committed acts of imprudence, or to have omitted reasonable precautions, such as will satisfy a jury that the carrier has not been commonly prudent and conscientious in the discharge of his duty. But the bailor will have no case beyond this limit; and the bailee will be exonerated if the jury be satisfied that, notwithstanding the loss or damage, he, or his servants, have exercised ordinary diligence and reasonable skill in endeavouring to perform the trust (*i*).

This doctrine was settled so completely in *Coggs v. Bernard*, that it does not appear to have been questioned since in banc. It was considered very fully, and not substantially disputed, in *Brind v. Dale* (*k*). The defendant was a town carman, who plied for hire in a public thoroughfare, but not regularly from one place to another; the plaintiff hired the defendant's servant to carry luggage to a certain point, and also agreed, on the servant's request, to follow the cart and look after the luggage. He did not follow; and subsequently sued for part of the luggage which was lost during the transit. On these essential facts, Lord Abinger, C. B., left it to the jury to say, first, whether the defendant was a common carrier; or, secondly, whether there was not a modified contract to the effect that the defendant would carry safely, only if

(*i*) Story on Bailments, s. 457.

(*k*) 8 C. & P. 207; and 2 M. & R. 80.

the plaintiff accompanied ; and, thirdly, whether there was negligence on the part of the defendant's servant. His lordship laid down the general law with remarkable distinctness as follows :—

“ The first objection that the defendant makes to the plaintiff's recovering in the action is, that he is not a common carrier. My opinion is, that the defendant is not a common carrier ; and, if necessary, I will give leave to enter a nonsuit on that point. The next question is, whether the plaintiff delivered these goods to the defendant as a common carrier. Now, a common carrier is in the nature of an insurer ; and if he carries without any qualification of his liability, he becomes an insurer against all but fire, tempest, and the king's enemies, and he insures against thieves and the frauds of his own servants. Still there are cases in which, although a person is not a common carrier, he is liable for the neglect of his own servants. I take it that, if a man agrees to carry goods for hire, although not a common carrier, he thereby agrees to make good losses arising from the negligence of his own servants, although he would not be liable for losses by thieves or by any taking by force ; or if the owner accompanies the goods to take care of them, and was himself guilty of negligence ; for it is a rule of law that a party cannot recover if his own negligence was as much the cause of the loss as that of the defendant. It appears that the defendant lets out carts, which ply at different stands ; and if, when the cart was let, the plaintiff agreed to go with the goods and watch them, it is manifest that he did not rely wholly on the defendant's servant. . . . You will therefore say whether the goods were delivered to the plaintiff as a common carrier ; or whether the circumstances do not show that the goods were put into the cart under a modified contract that the plaintiff should go with them and take care of them. If you think they were delivered under such modified contract, your verdict on the second issue” (which raised a traverse of the allegation

that the defendant was a common carrier) "ought to be for the defendant. The next question is, whether the goods were lost by the negligence of the defendant's servant. . . . If you think that there was no negligence in the defendant's servant; or that the negligence of the plaintiff himself contributed to the loss; you will find a verdict on the fourth issue for the defendant."

But where a carrier for hire, who is not a common carrier, expressly warrants the safety of the goods which he conveys, his liability will be the same as that of a common carrier, even although there are circumstances in the case which tend to show that the bailor never intended to leave them entirely in the custody of the carrier. Thus, where the plaintiff employed the defendant, who kept a cart and horse, to carry goods, and the plaintiff also sent a servant to watch the goods, and the latter were damaged by rain during the journey; it was held that, as the defendant had said to the plaintiff at starting, "I will warrant the goods shall go safe," the defendant, although not a common carrier by trade, placed himself, by these words of particular warranty, in the situation of a common carrier. The presence of the plaintiff's servant was held to be immaterial, and to be like the case where a man takes his portmanteau with him in a stage-coach and keeps his eye on it, yet notwithstanding the carrier is liable for the loss (*l*).

Where the declaration in such a case alleges a promise on the part of the defendant to carry safely and securely, it is held that a breach is sufficiently proved when it is shown that there was a valuable consideration for the promise, and that loss occurred from a want of ordinary diligence (*m*).

It is unnecessary to distinguish further, in this place, between special carriers for hire and common carriers. Whenever a doubt arises as to the class in which a bailee is to be placed, it is left as a question for the jury (*n*).

(*l*) Robinson v. Dunmore, 2 Bos. & P. 416.

(*m*) Ross v. Hill, 2 C. B. 877.

(*n*) See Brind v. Dale, *supra*.

CHAPTER III.

WHO ARE COMMON CARRIERS—CARRIERS OF PASSENGERS.

It is stated in an old case, that “any man undertaking for hire to carry the goods of all persons indifferently is a common carrier” (*a*). In Bacon’s Abridgment (Carriers A.) it is said:—

“All persons carrying goods for hire, as masters and owners of ships, lightermen, stage-coachmen, &c., come under the denomination of common carriers, and are chargeable on the general custom of the realm for their faults and misdemeanors.”

So a carrier of messages, as an electric telegraph company, may be a common carrier (*b*). But the Postmaster-General, under 12 Car. 2, c. 35, cannot be sued as a common carrier, and is not liable in his official character for the larceny, loss or miscarriage of a letter or its contents; although either he or any of his subordinate agents will be liable for such a loss if it be caused by his actual negligence (*c*).

In Story on Bailments, s. 495, it is laid down:—“To bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation *pro hac vice*. A common carrier has therefore been defined to be one who undertakes, for hire

(*a*) *Gisbourn v. Hurst*, 1 Salk. 26, C. P. 249.

(*c*) *Lane v. Cotton*, 1 Ld. Raym. 646; *Whitfield v. Lord Despencer*, 2 Cowp. 754.

(*b*) *M'Andrew v. Electric Telegraph Company*, 17 C. B. 3; 25 L. J.

or reward, to transport the goods of such as choose to employ him from place to place.

It is said by another eminent American authority :—

“ Common carriers undertake generally, for all persons indifferently, to convey goods and deliver them at a place appointed for hire, and with or without special agreement as to price. They consist of two distinct classes of men, viz., inland carriers by land or water, and carriers by sea (*d*).”

None of these definitions are quite exhaustive or unexceptionable. That of Mr. Justice Story approaches most nearly to completeness, but is, perhaps, wanting in distinctness. The element which distinguishes a contract of carriage, as a common carrier, from a special contract of carriage for hire, lies in the circumstance that the common carrier exercises his trust as an incident of an *ordinary* and *regular* profession. Therefore, the law presumes that he is a person necessarily of greater experience in his calling than a man who assumes it temporarily, and perhaps for a single occasion only. Accordingly, as it presumes greater skill in a professional carrier, so it expects from him greater security against loss or damage; and it also imposes on him a greater liability than belongs to a special and occasional carrier for hire, because the common carriers of former times were frequently the confederates of thieves; and because the nature of the profession is especially favourable to collusion with such characters (*e*). Therefore, from remote times, the common law drew a fundamental distinction, for loss or damage of the goods carried, between the liabilities of a common carrier and those of a special carrier for hire. It made the former an insurer against all accidents and damage, except such as occur by the act of God or the king's enemies (*f*); but it has left the special carrier liable only for culpable negligence.

(*d*) 2 Kent's Comm. 597.

wick, 4 Bing. 218.

(*e*) Holt, C. J., in *Coggs v. Bernard*, supra, p. 4; *Brooke v. Pick-*

(*f*) *Forward v. Pittard*, 1 T. R. 27.

Accordingly, a carrier, as soon as he is brought within the definition of a common carrier, becomes instantly an insurer of the goods intrusted to him, unless he have limited his liability by a special contract with the bailor (*f*).

Since, therefore, this extraordinary liability of insurance is imposed, for the above reasons, on a common carrier, it is clear that the regular pursuit and practice of his profession form distinguishing elements in a definition of his character. It should also be understood that although, in this treatise, the subject is confined to *inland* "common carriers," yet this phrase does not imply the terminus of a common carrier's transit. That may be bounded only by the limits of the earth; and every owner of a merchant-vessel who conveys exports regularly from a port in one hemisphere to a port in another hemisphere, is as much a common carrier as the daily carrier between two country towns. But there must be *regularity* and *permanency* in the occupation; and when the existence of these elements is questionable, it must be left as a fact for a jury to determine; and, according to their finding, the bailee will have the unlimited liabilities of a common carrier, or the comparative immunities of a special carrier for hire (*g*).

Thus, in *Ingate v. Christie* (*h*), the declaration charged the defendant with an agreement to carry a hundred cases of figs, and a loss by the negligence of the defendant's servants. The defendant does not appear to have been charged as a common carrier; but on a question whether the goods were delivered to him as such, or merely as a special carrier for hire, Alderson, B., held, that there was sufficient *primâ facie* evidence that the goods were delivered to him as a common carrier, in the fact that the defendant had "a counting-house with his name and the word 'lighterman' on the door-post of it; and that he carried goods in his lighters from the wharves to the ships

(*f*) *Gibbon v. Paynton*, 4 Burr. 2299. Morville, 2 E. & B. 750; 21 L. J. 319, Q. B.

(*g*) *Great Northern Railway v.* (*h*) 3 C. & K. 61.

for anybody who employed him." His lordship also said : " Everybody who undertakes to carry for anyone who asks him is a common carrier. The criterion is, whether he carries for particular persons only, or whether he carries for every one. If a man holds himself out to do it for every one who asks him, he is a common carrier ; but if he does not do it for every one, but carries for you and me only, that is a matter of special contract. Here we have a person with a counting-house and 'lighterman' painted on it ; and he offers to carry for every one."

It may be stated generally that :—

A common carrier is one who professes, as his public and regular occupation, to convey goods for hire from a certain place within the realm to another certain place, either within or without the realm ; and who, in the absence of an express contract of limited liability, impliedly warrants and insures their safe conveyance and delivery to the consignee, unless prevented by the act of God or the Queen's enemies.

In *Benett v. The Peninsular and Oriental Steamboat Company* (i), the declaration was against the defendants as common carriers for refusing to convey the plaintiff in a regular packet boat, belonging to the defendants, and duly advertised to convey passengers, on fixed terms, from Southampton to Gibraltar. The plea denied that the defendants were common carriers ; and it was left to the jury to say whether they were so ; and it was found that they were. On a rule for a new trial, it was contended that extra-territorial carriers were not common carriers ; but it was held that they are so within the description of Story, J., as stated above ; and his definition was cited with approbation by Wilde, C. J., to show that a carrier, from a place within the realm to a place beyond the realm, may well be a common carrier. This doctrine was settled clearly in *Crouch v. The London and North Western Railway Com-*

(i) 6 C. B. 775 ; 18 L. J. 85, C. P.

pany (*k*). There the declaration was against the defendants, as common carriers, for refusing to carry the plaintiff's goods from London to Glasgow. One of the pleas traversed the averment that the defendants were common carriers from London to Glasgow; and it appeared that the railway belonging to the defendants ended at Preston and Rugby; but that the defendants, by an arrangement with the ulterior railways, had been accustomed to book and receive, and carry goods beyond the limits of their own line, and over those of the ulterior railways to Glasgow; and to receive the price of the carriage for the whole distance. The defendants had also in the course of their business advertised and held themselves out to the public as carriers of goods through from London to Glasgow, at certain rates laid down in their published tables. These facts were held to constitute the defendants common carriers for the whole distance. Jervis, C. J., said: "It is not denied now, although the authorities are not numerous, that if a person holds himself out as a common carrier from London to Oxford, both termini being within the realm, he is bound to carry, within reasonable limits, all goods that may be tendered to him to be carried from London to Oxford. The only question on this part of the case is, whether that rule applies where one of the termini is a place out of England: and I think it does. It was admitted during the argument, and could not be denied, that if the defendants had accepted the goods in London, the common law would have engrafted on their contract an obligation to carry them to Glasgow. . . . Then, if it is admitted that when once they have held themselves out as common carriers, there is engrafted on their acceptance of the goods the common law liability to carry, even if they are to carry beyond the realm; it would seem also that they are subject to the other part of the common law liability, namely, to accept within reasonable limits all goods that may be ten-

dered to them to carry. If, therefore, being carriers within the realm, they are bound to take the goods offered to them to be carried within the realm; it follows that if they profess to be carriers beyond the realm, being themselves at the time they so profess within the realm, they are bound to accept and to carry goods beyond the realm upon the terms on which they profess to contract."

Carriers of Passengers.

A carrier of passengers, although he may be in popular language a common carrier, is not strictly such; for he does not insure nor warrant their safety. He contracts only, like an ordinary bailee for hire, to use reasonable skill and prudence in carrying; and he is liable only for actual, or culpable, negligence. "There is a wide distinction between contracts for the conveyance of passengers, and those for the conveyance of goods. In the latter case the parties are liable at all events, except the goods are destroyed or damaged by the act of God or the king's enemies; whilst in the former they are only responsible to their passengers in cases of *express negligence* (l)."

Accordingly, when a passenger sues for damage which he has suffered from the defendant in his capacity of carrier, it is not enough to show that the defendant is a public carrier, but it must also appear that the plaintiff suffered the damage through the actual negligence or default of the defendant.

Where the action (m) was for injuries sustained by the plaintiff, owing to the breaking down of a bridge as the train passed over it, Williams, J. told the jury that the question was, whether the bridge was constructed and maintained with sufficient care and skill, and of reasonably proper strength, with regard to the purposes for which it was made; and that if they should think not, and that

(l) Parke, J., *Crofts v. Waterhouse*, 11 Moore, 138; cf. *Lovett v. Hobbs*, 2 Show. 428.

(m) *Grote v. Chester and Holyhead Railway Company*, 2 Exch. 251.

the accident was attributable to any such deficiency, the plaintiff would be entitled to recover. It appeared that an eminent engineer had constructed the works. The court upheld the direction of the learned judge, on his statement that he had also directed the attention of the jury to the proposition that "if a party, in the same situation as that in which the defendants are, employ a person who is fully competent to the work, and the best method is adopted, and the best materials are used, such party is not liable for the accident; although it could not be contended that they were not responsible for the accident merely on the ground that they employed a competent person to construct the bridge."

It must therefore be held to be clear law, on the authority of all the cases, that a public carrier of passengers is not a common carrier to the extent of insuring their safety; that his common law contract obliges him to use only reasonable diligence in conveying such passengers; and that he is not liable for damage to the passenger during the transit, unless the jury be of opinion that the circumstances of the case call for a verdict of negligence against the carrier.

In *Benett v. The Peninsular Steamboat Company* (*n*) one principal point for the defendants was, that the declaration erroneously described them as common carriers; and it was contended, for the defendants, that the common law customary liability of carriers did not extend to carriers of passengers. The court held the description sufficient, and that the defendants were common carriers within the definition of Mr. Justice Story (*supra*, p. 16). Maule, J. said, "One of the points made by the Attorney-General is, that the liability of common carriers of goods and of common carriers of passengers is different. The allegation in this declaration can mean nothing else but that the defendants were common carriers of passengers in the same sense as Mr. Justice Story defines common carriers of goods. I

(*n*) 6 C. B. 775; 18 L. J. 85, C. P.; *supra*, p. 19.

can easily conceive the law with regard to the liability of carriers being repealed or altered, and yet parties might still continue to be common carriers, and an issue on that fact would be proved by the same evidence as was given in this case. Suppose the case of a common carrier between two places in New South Wales, and that the law was different there from the law of England, the plaintiff on an issue denying that the defendants were common carriers, would be entitled to succeed on evidence like this."

It will be observed that the argument in this case turned on a purely technical point, and that the only question was, whether the description of the defendants in the declaration was a sufficient statement of their duty to carry the plaintiff. The extent of their liability to carry the plaintiff safely and securely was not under consideration; and therefore the case does not affect the doctrine that a carrier of passengers, as such, is not an insurer. The court seems to have been indisposed to enter into a discussion or definition of the precise legal meaning of the term "*common carrier*;" and to have treated the distinction between a carrier and a common carrier as little more than verbal. The case is also remarkable as an indication of a tendency in the courts to strike from the established legal signification of the term "*common carrier*," the element which is conceived to be its prominent and essential characteristic, viz. the contract of insurance. On this point the language of Maule, J. in a late case deserves attention. His lordship says, "I deny that a man who is not an insurer of goods is therefore not a common carrier. A common carrier, who makes no stipulation and gives no notice with respect to the insurance of goods, is no doubt liable as an insurer of the goods; but a common carrier who by notice limits his liability, and says, 'I will not contract as an insurer, or I will only contract to such and such an extent, or to the extent of such a value,' still remains in all other respects a common carrier; and even in

that respect he is a common carrier; because, although the incident of being an insurer does not apply to him, that is simply because it is specially provided for. In every day's experience that is so (*o*)."

It may be submitted, with great deference to a most eminent judge, that this language is open to controversy. The cases have established certain conditions, which constitute every man who fulfils them, *eo instanti*, a common carrier. As soon as they are fulfilled the common law intervenes, and declares a contract of insurance to be implied in their fulfilment. This contract is not accidental to, but results necessarily from, the completion of the requisite conditions; and the established common law definition of a common carrier ceases to cohere and to exist, when deprived of its vital and essential principle—the contract of insurance. Such a common carrier, it is true, can limit his liability by an express contract with his consignor; but it may be submitted, that by so doing he not only ceases *pro tanto* to be a common carrier, but becomes converted at once into an ordinary special carrier for hire. It is important that law words should retain their established usage; and it may be suggested that great confusion and great misunderstanding would arise, if it were to be assumed that a common carrier can remain such after having got rid of the one essential liability, as an insurer, which distinguishes him from a special carrier for hire.

In cases of accident to passengers, where the defendant is not charged as a common carrier, the fact of the accident is *primâ facie* evidence of negligence, so as to render him liable (*p*). But this presumption of law is entirely rebutted by evidence that the accident was inevitable, or that it arose from the act of a stranger who was not the servant

(*o*) *Crouch v. London and North Western Railway*, 14 C. B. 255; 23 L. J. 73, C. P.

(*p*) *Carpue v. London and Brigh-*

ton Railway Company, 5 Q. B. 751; *Skinner v. London and Brighton Railway*, 5 Exch. 788.

of the defendants (*q*). In such cases it is the practice of pleaders to charge the carrier as an ordinary special carrier for hire; and to aver, as the duty of the carrier, an obligation to use "due and proper care and skill in and about the carrying and conveying of the plaintiff" (*r*); and, as a breach, the want of such due or proper care and skill, as the cause of the accident. This was done in *Skinner v. London and Brighton Railway*. There the plaintiff was in an excursion train belonging to the defendants, and was injured by a collision with another train on the line. It was argued for the defendants that as the plaintiff complained of negligence, he ought to have been required to prove it. But Pollock, C. B., said:—"Surely the fact of a collision between two trains belonging to the same company is *primâ facie* evidence of negligence on their part;" and Alderson, B., said:—"This is not the case of a collision between two vehicles belonging to different persons, where no negligence can be inferred against either party, in the absence of evidence, as to which of them is to blame. But here all the trains belong to the same company; and whether the accident arose from the trains running at too short intervals, or from their improper management by the persons in charge of them, or from the servants at the station neglecting to stop the last train in time, the company are equally liable; and it is not necessary for the plaintiff to trace specifically in what the negligence consists; and if the accident arose from some inevitable fatality, it is for the defendants to show it (*s*)."

Wherever there is a duty to carry passengers, the law implies a duty to carry them safely and securely. In *Collett v. London and North-Western Railway* (*t*), the defendants were under a statutory obligation to carry the Postmaster-General's mail-bags, and the officers in charge of them. The plaintiff, as one of such officers in the train,

(*q*) *Latch v. Rumner Railway Company*, 27 L. J. 155, Exch.

(*s*) Cf. *Cornman v. Eastern Counties Railway*, 29 L. J. 94, Exch.

(*r*) *Harris v. Costar*, 1 C. & P. 636.

(*t*) 16 Q. B. 984; 20 L. J. 411, Q. B.

was injured by a collision with another train ; and it was contended for the defendants that the contract to carry safely and securely, if it existed, was with the Postmaster-General, and not with the plaintiff. But Lord Campbell, C. J., said :—"The allegation in the declaration, that it was the duty of the defendants 'to use due and proper care and skill in and about the carrying and conveying of the plaintiff,' is made out in point of law. That duty does not arise from any contract with the plaintiff, but from the obligation imposed by the legislature upon the company to carry the mail-bags, and the officers of the Post Office in charge of the letters ; and if it be the duty of the company to carry the plaintiff at all, it must be their duty, in doing so, to use reasonable care and skill. It cannot be said that it is enough for the company to bring the dead body to the end of the journey."

The proprietor of a coach is liable for all accidents to passengers which may arise from his negligence during any part of the transit, and until the passengers are safely set down (*u*). If he is going over dangerous ground he ought to tell them, so as to give them the opportunity of alighting ; and if this information be not given when it ought to have been given, the proprietor is liable for the results of an accident (*x*). So if danger of any kind occur on the journey, the owner is liable if the driver do not take the safest course ; or unless he use at least a reasonable discretion in endeavouring to take it (*y*). And if the owner provide an unsafe vehicle, or commit any other negligence which renders it a prudent or reasonable course for a passenger to incur risk in order to escape the consequences of the owner's negligence, the owner is liable for the injury which the passenger may sustain in encountering such risk. Thus,

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| (<i>u</i>) <i>Aston v. Heaven</i> , 2 Esp. 533 ; | R. 518. |
| <i>Latch v. Rumner Railway Company</i> , | (<i>y</i>) <i>Jackson v. Tollett</i> , 2 Stark. |
| 27 L. J. 155, Exch. | 37 ; <i>Curtis v. Drinkwater</i> , 2 B. & |
| (<i>x</i>) <i>Dudley v. Smith</i> , 1 Camp. | Ad. 169. |
| 167 ; <i>Seymour v. Greenwood</i> , 9 W. | |

where a coachman, having a restive leader and a defective rein, was obliged to drive too near the side of the road ; and the plaintiff was either jerked off, or jumped off in the concussion : Lord Ellenborough held that, even in the latter event, the plaintiff was entitled to recover damages for breaking his leg, if he had a reasonable apprehension of danger ; but not if he acted from a rash apprehension of danger which did not exist (*z*). So when the damage arises from the restiveness of the horse, it is a question for the jury whether it amounts to vice, and whether the defendant was negligent in permitting the horse to be used (*a*). In all these cases the negligence of the driver is the negligence of the owner of the vehicle, if the relationship of master and servant exist (*b*).

Where the plaintiff was driving his waggon on his proper side, about four feet from the kerbstone ; and the defendant's servant, seeing the defendant put his horse to the trot to pass the plaintiff, set spurs to his horse, which in passing the plaintiff kicked out his eye ; it was held that there was evidence to support a verdict against the defendant (*c*).

Where there has been no negligence on the part of the owner or the driver, there is no responsibility in either. Inevitable accident is a sufficient answer to all claims for damages in such cases (*d*) ; for a carrier of passengers undertakes only that, as far as human foresight can go, he will provide for their safe conveyance ; but he does not warrant their safety (*e*). A carrier also promises impliedly, that his vehicle is equal to the journey which it undertakes ; and it is his duty to examine it before the commencement of the journey, and whenever there is any reason

(*z*) *Jones v. Boyce*, 1 Stark. 493.

(*a*) *Harris v. Costa*, 1 C. & P. 636.

(*b*) *White v. Boulton, Peake*, N. P. 113 ; *Brucher v. Fremont*, 6 T. R. 659, and *infra*.

(*c*) *North v. Smith*, cf. *Times*, May 27, 1861.

(*d*) *Aston v. Heaven*, 2 Esp. 533.

(*e*) *Christie v. Griggs*, 2 Camp. 80, per Mansfield, C. J. ; *Mayor v. Humphries*, 1 C. & P. 252, n.

to suspect a defect (*f*). His duty and liability are the same, even when he carries only a statutory number of passengers (*g*).

“ If a person takes a place in a stage coach and pays at the time only a deposit, a half the fare for example, and is not at the inn ready to take his place when the coach is setting off, the proprietor of the coach is at liberty to fill up his place with another passenger; but if at the time of taking his place he pays the whole of his fare, in such case the carrier cannot dispose of his place; but the passenger may take it at any stage of the journey he thinks fit” (*h*). So if several persons take places, saying that they wish to travel together, the carrier has no right to separate them (*i*). And a postmaster is bound to proceed on his journey as soon as the passenger requires him to do so, if the latter have been permitted to put his luggage in the carriage and to have entered it himself (*j*).

A common carrier of passengers, like a common carrier of goods, is bound to receive and carry all alike, without distinction of persons, provided that his fare be duly paid or tendered on demand. In this respect his liability is commensurate with that of an innkeeper; and as the latter is bound to receive and accommodate all decent and orderly people to the extent of his capability of reception; so a common carrier of passengers is under the same obligation. But he is not bound, nor has he any right to overcrowd his vehicle; and there seems to be no doubt, that, in such a case, a previous passenger may vacate his seat and sue the carrier on a breach of contract (*k*).

A common carrier may refuse to carry, and, if necessary, may expel a disorderly passenger; and, according to the American law, “ he is not bound to admit passengers who

(*f*) *Bremner v. Williams*, 1 C. & P. 414; *Sharp v. Grey*, 9 Bing. 457.

(*g*) *Israel v. Clark*, 4 Esp. 259.

(*h*) *Ker v. Mountain*, 1 Esp. 26, per Lord Kenyon, C. J.

(*i*) Per Abbott, C. J., *Long v. Horne*, 1 C. & P. 612.

(*j*) *Mander v. Cooper*, 4 Esp. 260.

(*k*) *Long v. Horne*, 1 C. & P. 610.

refuse to obey reasonable regulations; or who are guilty of gross and vulgar habits of conduct; or who make disturbances; or whose characters are doubtful, or dissolute or suspicious; and *à fortiori* persons whose characters are unequivocally bad”(l). There can be little doubt that the law of England is the same (m). It appears also that a carrier of passengers is not bound to admit a person of notoriously bad or disorderly character; but if he have admitted him, and the passenger has paid his fare, he cannot be turned out, nor otherwise ill-treated or insulted, as long as he behaves with proper decency (n).

The time and place of starting; the duration of the journey; and the terminus at which the passenger is to be set down, will all be matters of special contract, or of a contract to be implied from the evidence and circumstances of each case. The time tables of a railway company are evidence in such cases (o).

The rule of the road is that the carrier and driver of vehicles shall keep to the left; and to the right of a foremost vehicle in passing it. But a deviation from the rule of the road is at most only *primâ facie* evidence of negligence; and it has been even said, that it is not even *primâ facie* evidence (p). At times it is the duty of a carrier to disregard the rule of the road; as if he see a horse coming along furiously on the wrong side (q): and when there is no other carriage or animal in his way he may clearly drive in any part of the road which he may prefer (r). But if the journey be at night, there will be at least *primâ facie* evidence of negligence, if an accident occur while the carrier is on the wrong side of the road (s). But generally,

(l) Angell, sect 525; Jencks v. Coleman, 2 Sumn. (Cir. Co.) R. 221, Story, J.

(m) Cf. Rex v. Ivens, 7 C. & P. 213; Hawthorn v. Hammond, 1 C. & K. 404.

(n) Coppin v. Braithwaite, 8 Jur. 875; Angell, sect. 532.

(o) Denton v. Great Northern Railway, 25 L. J. 129, Q. B.

(p) Wayde v. Carr, 2 Dowl. & Ry. 255.

(q) Turley v. Thomas, 8 C. & P. 103.

(r) Aston v. Heaven, 2 Esp. 533.

(s) Mayhew v. Boyce, 1 Stark. 423.

the question of negligence will depend on all the circumstances of such cases.

A driver of a vehicle must take reasonable care to avoid hurting people who walk in the road; "for a man has a right to walk in the road if he pleases. It is a way for foot passengers as well as for carriages. But he had better not, especially at night, when carriages are passing along" (*t*). Foot passengers, in crossing a highway, must also take due care to avoid vehicles (*u*).

The conveyance of passengers by public stage carriages has been regulated by the 2 & 3 Will. 4, c. 120, and the 2 & 3 Vict. c. 66, as to the duties which may be levied on them by the Commissioners of Stamps. In the former statute (s. 5) it is enacted, that "every carriage used or employed for the purpose of conveying passengers for hire to or from any place in Great Britain, and which, when passing along any highway or other road, shall travel at the rate of three miles or more in the hour, shall, without regard to the form or construction thereof, be deemed and taken to be a stage carriage within the meaning of this act, provided the passengers, or any one or more of them, thereby conveyed, shall be charged or shall pay separate and distinct fares, or a separate and distinct fare; or shall be charged or pay at the rate of separate and distinct fares for their respective places or seats, or his place or seat therein, or conveyance thereby; and in all proceedings at law or otherwise it shall be sufficient to describe any carriage used or employed as aforesaid by the term 'stage carriage,' without further or otherwise describing the same: provided that the said term 'stage carriage' shall not be deemed to extend to or include any carriage used or employed as aforesaid wholly upon any railway, nor to any carriage drawn or impelled by the power of

(*t*) Per Lord Denman, *Boss v. Lytton*, 8 C. & P. 407; cf. *Cotterill v. Starkey*, 8 C. & P. 691; *Wakeman v. Robinson*, 1 Bing. 213.

(*u*) *Cotton v. Wood*, 29 L. J. 333, C. P.; *Cornman v. Eastern Counties Railway*, 29 L. J. 94, Exch.

steam, or otherwise than by animal power." Every person keeping any such carriage must have a licence from two Commissioners of Stamps, and must have a numbered plate fixed in the carriage, and other particulars painted on it according to the requirements of the act (s. 6). Such plates are to be changed when defaced, or no longer distinctly visible (s. 24). The licences are to contain particulars of the christian name, surname and place of abode of every proprietor or part proprietor of the carriage; the name of the extreme place from which and to which such carriage shall be authorized by such licence to go or pass; and the route or line of road by which such carriage shall travel to or from such extreme places; the distance in miles or fractions of miles between such extreme places; the number of journeys; and the total number of miles upon which this duty shall be assessed; the number of passengers which may be carried inside and outside, &c. (s. 11). The duties are settled by 2 & 3 Vict. c. 66. Any misdescription in the licence is a misdemeanor (s. 10); and the licence must be renewed yearly (s. 13). If any person keep or use a stage carriage without a licence, or without a proper plate, he incurs a penalty of twenty pounds (s. 27); and if any carriage, whether licensed as a stage carriage or not, ply for passengers without having a numbered plate, the driver, if he be not the owner, incurs a penalty of ten pounds (s. 30). A penalty of five pounds is incurred for every passenger who is taken beyond the licensed number (s. 34). Two children under seven reckon as one passenger (s. 35). Every stage carriage must have the name and surname of the owner of the carriage painted distinctly upon some conspicuous part of each side of the carriage, and the number of passengers which the licence authorizes the owner to carry (s. 36). The statute contains provisions also as to the disposition of outside passengers (ss. 37—44); imposes a penalty of five pounds for various acts of negligence and misconduct on the part of the driver or guard (ss. 47, 48); and many other minor regulations, for

which the act will be best consulted. The law relating to the management of hackney carriages in London is regulated by the 1 & 2 Will. 4, c. 22; 6 & 7 Vict. c. 86, and by the Metropolitan Hackney Carriages Acts (16 & 17 Vict. cc. 33 and 127). In other principal towns, such as Plymouth, commissioners are authorized under local acts to grant licences to owners of hackney carriages; to regulate fares; and to exercise a general superintendence over the proprietors and drivers of such carriages. (See also 10 & 11 Vict. c. 89, ss. 21—23, 37—68.)

CHAPTER IV.

ON THE COMMON LAW DUTY OF COMMON CARRIERS TO
CONVEY AND DELIVER GOODS SAFELY AND SECURELY.

A COMMON carrier is bound to carry to any point, within his transit or circuit, and by his ordinary road (*a*), the goods of any person who tenders him a reasonable remuneration for his labour (*b*). He is answerable, in the nature of an insurer, for the safe conveyance and delivery of the goods; and this liability begins as soon as he receives them into his custody, and ends only when he has delivered them at the specified place of consignment, or to the authorized consignee (*c*).

1. *A Common Carrier is bound to receive Goods which are tendered to him to be carried for Hire.*

This duty of a common carrier is commensurate with that of an innkeeper. If a man take upon him a public employment, he is bound to serve the public as far as the employment extends; and, for refusal, an action lies (it has been said) against a farrier for refusing to shoe a horse; against an innkeeper for refusing to receive and entertain a guest when he has room; and against a carrier for refusing to carry goods, his waggon not being full. So, an action will lie against a sheriff for refusing to execute a process; and, it is said, against the Postmaster-General, for refusing to receive a letter (*d*).

(*a*) *Davies v. Garrett*, 7 Bing. 716.

(*b*) *Munster v. South-Eastern Railway*, 4 C. B., N. S. 676; 27 L. J. 308, C. P.

(*c*) *Dale v. Hall*, 1 Wils. 281; and see 1 Smith's Lead. Cas. 101 b.

(*d*) *Lane v. Cotton*, 1 Lord Raym. 654.

“ If a person chooses to profess to be a common carrier, the law creates a duty to receive things brought for carriage; and he may be liable *ex delicto* for refusing to receive. But this duty is regulated according to his will in many respects. He may choose the kind of conveyance, the times for transit, the mode of delivery, the articles that he will prefer to carry, what price he will have, when it shall be paid; and the duty to receive is always limited by the convenience to carry” (e).

Accordingly, where a railway had elected to carry generally as common carriers, it was held that this election did not compel them to carry goods, such as coals, which they had never professed to carry. Parke, B., said:—“ The question is, whether the defendants are bound to carry coals from Melton Mowbray to Oakham. If they are merely in the situation of carriers, at common law they are not so bound; for they never professed to carry coals from or to those places. At common law a carrier is not bound to carry for every person tendering goods of any description; but his obligation is to carry according to his public profession.” His Lordship then referred to *Lane v. Cotton* (f), and added: “ In the case of an innkeeper, there is no question that the action will lie. So also in the case of a carrier; and that arises from the public profession which he has made. A person may profess to carry a particular description of goods only; for instance, cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London; and then he would not be bound to carry to or from the intermediate places. Still, until he retracts, every individual (provided he tender the money at the time and there is room for the conveyance) has a right to call upon him to receive and carry goods

(e) Per Erle, J., *M'Manus v. Lancashire and Yorkshire Railway*, 4 H. & N. 327; 28 L. J. 353, Exch.,

Sc. Cam.; cf. *Oxlade v. North-Eastern Railway*, 9 W. R. 272.

(f) *Supra*, p. 33.

according to his public profession. Now, if the defendants stand in the situation of carriers at common law, they are not liable, because it does not appear in evidence that there ever had been a public profession by them that they would carry coals from Melton Mowbray to Oakham; and, further, it is found as a fact that they had not the convenience for so carrying" (*f*).

If the carrier be sued for refusing to carry such goods as he has professed to carry, it should be alleged and proved that the defendant had convenience to carry, and that the goods had been formally tendered, together with the hire, and refused by the defendant (*g*).

The carrier is entitled to have his hire paid him before he takes the goods into his custody (*h*). In an action, however, for refusing to carry, it is enough to aver readiness and willingness to pay the hire, without averring an actual tender (*i*). But the carrier is entitled to insist on the full price of carriage being paid beforehand; and he may, if such price be not paid, refuse to carry on the terms imposed by the common law, and insist upon his own (*k*).

If the carrier demand an unreasonable price, as a condition precedent to his acceptance of the goods for carriage, the consignor may tender him what he conceives to be a reasonable amount; and the carrier will be liable to an action if he still refuse to carry, and if the amount tendered be a reasonable remuneration. Thus, where a railway acted as common carriers under an act of parliament, which authorized them to demand a *reasonable* sum for the conveyance of goods; and the plaintiffs tendered goods for conveyance, with a sum which the court held, on the

(*f*) *Johnson v. Midland Railway Company*, 4 B. & Ald. 28.
Company, 4 Exch. 367.

(*g*) *Jackson v. Rogers*, 2 Show. 332; *Munster v. South-Eastern Railway*, 27 L. J. 308, C. P.

(*i*) *Pickford v. Grand Junction Railway Company*, 8 M. & W. 373;
Wyld v. Pickford, 8 M. & W. 443.

(*k*) Per Parke, B., in *Wyld v. Pickford*.

(*h*) *Best, C. J., Batson v. Dono-*

special facts of the case, to be reasonable, but which the defendants refused as inadequate: the latter were held to be clearly liable for a breach of an implied duty (*l*).

2. *A Common Carrier will be liable as an insurer for all loss or damage which goods in his custody suffer during the transit.*

“To give due security to property, the law has added to that responsibility of a carrier, which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer.

“From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to the country when they happen, that no person would be so rash as to attempt to prove that they had happened, when they had not; namely, the act of God and the king’s enemies” (*m*).

A common carrier can avoid or limit his liability as an insurer, only by virtue of an express contract between him and the owner, or by the statute law. The courts will require distinct evidence of such an express contract of limitation having been engrafted on the contract of unlimited liability, which the law implies primarily as soon as the carrier is proved to be a common carrier, and not a mere special carrier for hire (*n*).

This liability, which at common law was unlimited, has also been restricted in certain cases by the Carriers Act (11 Geo. 4 & 1 Will. 4, c. 68), and in the case of railways by the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31); but it still exists in all cases which do not fall within the provisions of these acts. But if the loss can

(*l*) *Pickford v. Grand Junction Railway Company*, 10 M. & W. 399.

(*m*) *Best, C.J.*, in *Riley v. Horne*, 5 Bing. 220; *Oakley v. Portsmouth, &c. Company*, 11 Exch. 618; 25

L. J. 99, Exch.

(*n*) *Shaw v. York and Midland Railway*, 18 Q. B. 347; *Chippendale v. Lancashire and Yorkshire Railway*, 15 Jur. 1106.

be traced in any way to the fraud or negligence of the consignor, the carrier will be absolved.

In *Gibbon v. Paynton* (*o*), the plaintiff had concealed 100*l.* in a bag of hay, and intrusted the bag to the defendant, a common carrier, to be conveyed to A. The plaintiff was aware that the defendant had published notices declaring that he would not be liable for the loss of money unless it were delivered to him as such; but the plaintiff, notwithstanding, did not communicate the fact. The court held this concealment to be constructive fraud in the plaintiff, and that the defendant was therefore not liable for a loss during the transit. Lord Mansfield said, "If the owner of the goods has been guilty of a fraud upon the carrier, such fraud ought to excuse the carrier." This case would now be within the Carriers Act (11 Geo. 4 & 1 Will. 4, c. 68, s. 4), and the mere concealment of value would limit the carrier's liability, although the public notice alone would not limit (s. 4); but the principle of this case is still applicable where there is fraudulent concealment or negligence on the part of the consignor (*p*).

In *Batson v. Donovan* (*q*), the defendants had given notice that they would not be liable for parcels of value unless paid for and entered as such. The plaintiffs knew of this notice, but, notwithstanding, delivered a large parcel of bank-notes to the defendants, who were common carriers, without communicating the contents. The parcel arrived at the end of the transit, but was stolen before delivery, owing to the carelessness of the defendants' servant. Bayley, J., left it to the jury to say whether the plaintiff dealt fairly by the defendants in not apprising them of the value. This direction was held, by three judges to one, to be right.

(*o*) 4 Burr. 2301.

Eames, 3 B. & C. 601.

(*p*) Cf. *Bradley v. Waterhouse*, 3 C. & P. 318, and note; *Mayhew v.*

(*q*) 4 B. & Ald. 21.

On the first point Bayley, J., said: "A carrier is to a certain extent an insurer; and concealment, if it varies the risk, discharges the underwriter. The value here does increase the risk; that value is concealed; it is concealed wrongfully; then why is the defendant to be liable?" And his Lordship cited, with approbation, the *dictum* of Mr. Justice Yates, in *Gibbon v. Paynton*, that "a carrier ought not to be answerable where he is *deceived*." So where the plaintiff, knowing that his goods were likely to be seized by rioters, induced a carrier to convey them; it was held, that the latter would not be liable for the loss by seizure, if the danger had been concealed from the carrier, or if the owner of the goods could be considered to have acquiesced tacitly in the risk (r).

The cases in which carriers have been held to be not liable on account of fraud in the consignor are chiefly before the Carriers Act; and they have been cases in which the consignor has been affected with notice from the carrier that the latter will not be liable for valuable goods. The 4th section of the Act expressly precludes carriers from the exercise of the uncertain right which they enjoyed before the statute, of limiting their liability by notice in cases which are not within the provisions of the Act; but, although mere concealment of the value of goods will no longer amount to fraud in a consignor, whether affected with notice or not from the carrier, the common law right to impeach the transaction, on the ground of other circumstances which amount to fraud, remains as before the statute.

3. *A Common Carrier must deliver his Consignment safely and securely.*

All common carriers are bound to deliver as well as to carry the goods consigned to them (s). In *Golden v. Man-*

(r) *Edwards v. Sherratt*, 1 East, 604. *Golden v. Manning*, 2 W. Bl. 916; 3 Wils. 429.

(s) *Owen*, cited by Gould, J., in

ning, the defendant had undertaken to carry goods from the plaintiff to A. The package had been properly directed by the plaintiff, but the address had become effaced during the transit; and the package was therefore detained, on its arrival at the defendant's terminus, in his warehouse, where it remained for a year, at the end of which time the plaintiff discovered accidentally that it had not been delivered to the consignee. It also appeared that the defendants, if they had used moderate diligence, could have discovered the address of the consignee. The plaintiff was held entitled to damages for injury to the goods during the negligent detention; and it was said by the court that "there can be no doubt that carriers are obliged to send notice to persons to whom goods are directed, of the arrival of those goods within a reasonable time, and must take special care that the goods are delivered to the right person." But this liability and duty, as will be seen subsequently, may be infinitely modified by the terms of an express and special contract (*t*). In the absence of such a special contract, the liability of the carrier for loss or damage up to the time of delivery will be the same as that which he incurs during any other part of the transit.

A common carrier's duty to deliver safely, arising, as it does, out of his duty to convey safely, has become latterly, in the majority of cases, a question of fact depending on the special circumstances of the original contract between him and his consignor, or consignee. His absolute common law liability as an insurer is indisputable; but the indulgence, and perhaps it may be said the laxity and indifference, of the legislature has allowed a system of limited liability to spring up, which has almost inextricably confounded the duties and rights of different classes of carriers, and practically converted his relation to the public into a species of despotic monopoly, in which the carrier

(*t*) *Shaw v. York and North Midland Railway*, 15 Q. B. 347; *Chippendale v. Lancashire and Yorkshire Railway*, 15 Jur. 1106; and *infra*, Chapter VIII.

dictates, and the employer acquiesces in, the special terms on which alone the former will consent to act for the latter. A common carrier, as such, is still liable to an action for refusing to carry, in the ordinary course of his business, on any terms but those of unlimited liability (*u*); and it would be well if this fact were more generally known, and more frequently acted on by the public. But the growth of special contracts, which are forced upon the public by the carrier, is gradually frittering away the common law duties of the latter, and converting the former into a passive victim of extortion.

In considering, therefore, the positive duties of a common carrier during the course of his transit, and up to the moment of delivery, it is essential to ascertain whether his common law liabilities have been abolished or modified by express contract. This branch of the subject will be treated more minutely in a later part of this work; but it may be desirable to notice here a few of the recent cases on the subject of a carrier's duty to deliver his consignment safely and securely.

The Great Western Railway Company *v.* Goodman (*v*), was a case stated on appeal by the judge of a county court. The plaintiff, intending to travel by the railway to West Drayton, took her ticket at the Paddington terminus, and paid the usual fare. She then called one of the company's porters, and, having told him that she was going by the next train to West Drayton, desired him to label her luggage for that place, viz. two small boxes and a trunk. The plaintiff proved that she saw all the articles labelled, but could not swear that they were labelled for West Drayton. She then left the luggage with the porter and entered the train. On arriving at West Drayton she received only the two small boxes; and it was admitted by the defendants that the trunk had been stolen after its delivery to the porter.

(*u*) *Munster v. South-Eastern C. P.*
Railway, sup. p. 33; 27 L. J. 308, (v) 12 C. B. 313; 21 L. J. 197, C. P.

By a bye-law of the company, which under their special act was to be binding on all parties, the company had announced that every passenger would be allowed to take a certain amount of luggage free of charge, but that the company would "not be responsible for the care of the same unless booked and paid for accordingly." The plaintiff's luggage was within the allowed limit, but had not been booked nor paid for as such. It appeared, also, that the company had made no arrangements for booking passengers' luggage; that it was not usual for such to be booked; and that a witness, who not long before had applied to book and insure his luggage, had been told by one of the company's servants "to give it to the porters and they would take care of it."

On these facts the defendants contended that they were not liable: first, because the trunk had never been delivered to them; and secondly, because the bye-law absolved them. But the court held that there was a sufficiently clear case of *primâ facie* liability made out against the railway, and sufficient evidence to warrant a verdict for the plaintiff.

In this case the defendants were apparently sued as ordinary special carriers for hire. No point was made that they were common carriers and liable as insurers. But the special facts appear to have been treated as forming a special contract, to convey safely, and to deliver safely. The effect of the bye-law was regarded as neutralized by the conduct of the defendants, which showed constructively that they had not intended to enforce it; and the nature of the contract was held to be simply a question of evidence. Still it must be understood that such a contract is not an absolute contract to deliver, but merely to use that ordinary care which is exacted from special carriers for hire. The implied, although not the expressed, ground of the verdict for the plaintiff, must be taken to have been the negligence of the defendants; of which, in the absence of opposite evidence of due care on their parts, the proof of the loss was sufficient *primâ facie* evidence (x).

(x) *Supra*, p. 24.

But in an earlier case, *Richards v. London and South Coast Company* (y), the declaration was against the railway as common carriers; and the case was, that the plaintiff's wife, as a passenger, had intrusted her luggage to a company's porter, who had placed her other luggage in the van, but put her dressing-case under her seat in the carriage. On arriving at the terminus, the company's servants had placed, as she thought, all her luggage in a hackney coach close to the platform; but it appeared subsequently that the dressing-case was missing, and that it had not been placed in the hackney coach. The court supported a verdict for the plaintiff on the ground that, according to the course of the company's business, there was no complete delivery to the plaintiff's wife until the company's servant had placed the dressing-case in the hackney coach. On the general principle, *Wilde, C. J.*, said: "The duty of common carriers is perfectly well understood; they give a warranty safely and securely to convey and *deliver*. It is immaterial whether there be negligence or not; *the warranty is broken by nondelivery*." But it must not be inferred from this case that even common carriers will be liable in all cases for the nondelivery of a passenger's luggage when the passenger voluntarily and deliberately assumes the custody of it. Such a doctrine would be clearly opposed to every principle of common justice and common sense; and although it is not without authority, it can hardly be expected that it would be upheld in these days. It was said indeed in *Robinson v. Dunmore* (z), that it had been determined that "if a man travel in a stage-coach and take his portmanteau with him, though he has his eye on the portmanteau, yet the carrier is not absolved from responsibility." But *Richards v. The London and South-Western* is by no means an authority in support of this view, and the language of *Wilde, C. J.*, is clearly opposed to it. There it is clear that the judgment of the court rested on the principle that there had

(y) 7 C. B. 839; 18 L. J. 251, (z) 2 Bos. & P. 419.
C. P.

been a complete bailment to the company when the plaintiff's wife delivered the trunk to their servant; and that the act of placing it under the seat in the passengers' carriage, although apparently by her direction, and certainly with her sanction, was, notwithstanding, not her act, but the act of the company's servant, who in doing it was conceding only a gratuitous privilege, which, as such, could have no effect in lessening the company's antecedent liability. Any other view of this case is manifestly unreasonable and untenable. Accordingly Wilde, C. J., said: "There is nothing more common than for persons to put part of their luggage into the same carriage with them, and that may be done under such circumstances as never to cast any responsibility on the carriers, but that is to be proved. When this is done by the company's servants the company are not relieved from their liability as carriers in respect of it. So, a passenger taking a valuable article openly and notoriously into the same carriage in which he travels, will not save the company from responsibility. The case is quite different from that of goods which are about the person of a passenger, which are to be considered entirely under his personal control and custody. In that case there is no delivery to or acceptance by the company. Acceptance by the company is the legal result of goods placed in their hands in the ordinary way in which they consent to receive them."

Richards v. The London and South Coast Railway was approved and confirmed in *Butcher v. The London and South Coast Railway (a)*. In this last case the plaintiff, on entering the railway carriage, had his portmanteau placed in the luggage-van, but kept with him, during the whole journey, a small hand-bag containing money and valuables worth 240*l*. When the train arrived at the terminus, the plaintiff got out on the platform with the bag in his hand. A company's servant then enquired of him whether he should get him a cab; and on an affirmative

(a) 16 C. B. 13; 24 L. J. 137, C. P.

reply, took the bag, and stated subsequently that he had placed it on the foot-board of the cab which he had engaged; but when the plaintiff (who had remained to take care of his portmanteau) got there, he found that the bag had disappeared, and the driver denied that it had ever been put on the cab. It also appeared to be the usual course for the company's servants to assist gratuitously in removing passengers' luggage from the trains to the authorized cabs in attendance, of which the plaintiff's cab was one. The jury found generally for the plaintiff; and the court held that there was evidence to support the verdict.

It is to be observed, that, in this case, it was not left to the jury to say whether there had been *originally* a delivery of the carpet bag by the plaintiff to the company; but it was assumed that there had been. The only question, therefore, was whether the bailment had been determined by a redelivery to the plaintiff. That question was decided, as in *Richards v. The London and South Coast Company*, by a reference to the company's usual course of dealing; and although *prima facie* there was a complete redelivery to the plaintiff the instant that he stepped from the carriage on to the platform, because there the company's contract to convey and deliver safely was actually performed; yet the voluntary and self-imposed custom of the company to deliver the luggage of passengers, not merely on to the platform but also into the cabs, was held to affect the defendants with a supplementary liability, inseparably engrafted on the original contract to deliver safely and securely. It was held, therefore, that it was not discharged by the company's servant placing the bag in a vehicle, which virtually and at the time was under the care of another servant of the company; nor, apparently, until all the luggage, and probably the passenger himself, were in the vehicle (*b*). Still it appears somewhat singular

(*b*) Cf. *Munster v. South-Eastern Railway*, 4 C. B., N. S. 676; 27 L. J. 308, C. P.; *Blackmore v. Bristol and*

Exeter Railway, 27 L. J. 167, Q. B.; *Cooper v. London and South-Western Railway*, 27 L. J. 324, C. P.

that a liability in the nature of an insurance should be fixed on the carrier after the performance of all which he originally contracted to do, and all that he was really bound to do; and that a voluntary courtesy, after the virtual determination of the bailment, should involve a liability without clear evidence of gross or culpable negligence. In this respect these cases are hardly reconcilable with *Garside v. The Proprietors of the Trent and Mersey Navigation* (c), which does not appear to have been noticed in the case, although they agree in principle perhaps with *Hyde v. Trent Navigation* (d) and *White v. Humphery* (e). It is also a little remarkable that no question was raised by the pleadings, nor in the course of the argument, as to the apparent exemption of the company from all liability under the 1st section of the Carriers Act.

In an action against a carrier for the loss of goods it is sufficient evidence of nondelivery to show that the goods never reached the consignee (f).

In *Griffiths v. Lee* (g), to prove nondelivery, the consignor stated that he gave the parcel in question to the carrier's servant, properly addressed to the consignee. The consignee's servant stated that he did not know of the delivery, and believed that the parcel could not have been delivered without his knowledge. *Hullock, B.*, held this to be sufficient *primâ facie* evidence of nondelivery. So, evidence that the weight or amount of goods delivered to the consignee is less than the weight or amount of goods delivered to the carrier, is sufficient *primâ facie* evidence to charge the latter for the deficiency, or to call on him to show that it did not arise from his negligence (h). But when it is consistent with the evidence that the carrier may have delivered, the carrier will be exempt. Thus,

(c) 4 T. R. 581; and supra, p. 10. 2 E. & B. 822.

(d) 5 T. R. 389; and infra, p. 46. (f) *Gilbart v. Dale*, 5 Ad. & El. 543.

(e) 11 Q. B. 43; and supra, p. 11. (g) 1 C. & P. 110.

11; cf. *Giles v. Taff Vale Company*, (h) *Hawkes v. Smith*, C. & M. 72.

in the *Midland Railway v. Bromley* (*h*), the company had undertaken to carry the plaintiff's portmanteau from Gloucester to Bristol, and to deliver it to the Bristol and Exeter Company, by whom it was to be carried to Torquay. There was evidence that the portmanteau had arrived at Bristol, and had been placed on a truck by one of the defendants' porters; and that the truck had been taken over to the Bristol and Exeter Station; but there was no evidence to show what had become of it after it was placed on the truck, nor whether it was on the truck when the truck was brought to the Bristol and Exeter Station. At Torquay the portmanteau was missed. It was held, that, on this evidence, it was as reasonable to suppose that the portmanteau had been lost on the Bristol and Exeter line as on that of the defendants; and the plaintiff was nonsuited.

4. *A Carrier must deliver his Consignment to the Consignee or his Agent; or at an authorized place of delivery.*

In *Hyde v. Trent and Mersey Navigation Company* (*i*), the defendants were common carriers, who had undertaken to carry the plaintiff's goods from A. and deliver them to the plaintiff at B. The goods arrived at B.; and, according to the usage of the trade, were placed for safe custody by the defendants in a warehouse belonging to C.; there to remain until they could be carted to the plaintiff by D. The charges for the temporary warehousing, and also for the cartage, were included in the original charge for carriage; but the plaintiff, at the time when he contracted with the defendants, knew that they received the charge for warehousing and cartage only as agents for C. and D. respectively. The goods were placed in the warehouse by the defendants, and there burned accidentally. The court held, that as the charges for warehousing and cartage had been

(*h*) 17 C. B. 372; 25 L. J. 94, (*i*) 5 T. R. 389; *supra*, p. 45.
C. P.

included and apparently insisted on in the whole charge, there was a binding contract by the defendants to deliver safely, not only at the warehouse at B., but also to the plaintiff at his residence at B.

In this case the court held unanimously that the special facts created an obligation on the part of the defendants to deliver to the plaintiff at his residence; and although the charges were actually distinct, yet that they were so far identical and one, as to constitute an insurance contract to deliver safely to the plaintiff beyond the known limits of the carrier's transit. But there was some difference of opinion among the members of the court on the general question as to the ordinary termination of such transit. Lord Kenyon, C. J., seems to have thought that the carrier's liability ends as soon as he has wharfed or warehoused his consignment at the end of the transit(*j*); that generally there is a complete delivery at this point, sufficient to absolve the carrier from subsequent liability; and that warehousing and portorage are in the nature of distinct contracts between the consignee and third parties, with which the carrier, as such, is not concerned. But the rest of the court concurred with Ashhurst, J., that generally "a carrier is bound to deliver the goods to the person to whom they are directed;" and that the warehouseman and porter in the case were the servants of the carrier. Grose, J., said: "The law which makes carriers answerable as insurers is indeed a hard law; but it is founded on wisdom, and was established to prevent fraud. But it seems to me that it would be of little importance to determine that carriers were liable as insurers, unless they were also bound to see that the goods were carried home to their destination; since as many frauds may be practised in the delivery as in the carriage of them. In general, the carrier appoints a porter, who provides a cart for the purpose of delivering goods; but it would be open to an infinity of frauds if the carrier could discharge himself of his responsibility by

(*j*) Cf. *Giles v. Taff Vale*, 2 Ell & Bl. 822, Sc. Cam.

delivering them to a common porter—a person of no substance—a beggar, of whose name the owner of the goods never heard, and against whom, in the event of the goods being lost, there could be no substantial remedy. . . . The defendants therefore ought to be answerable for the acts of those whom they nominate. . . . I think that common carriers are answerable if the goods be lost at any time before they are delivered to their owners.”

This doctrine appears to be good law. Accordingly, if the goods arrive at the end of the transit and be lost before delivery, or delivered to a wrong consignee, or even to the actual consignee, under circumstances which ought to have made the carrier doubt whether he ought to deliver his consignment, a common carrier will be liable, without negligence, as for a nondelivery; and a special carrier for hire for a negligent delivery.

In *Stephenson v. Hart (k)*, J. W., intending to defraud the plaintiff, applied to him to send a parcel of valuable goods addressed to J. W., 27, Great Winchester street, London. The plaintiff accordingly delivered such a parcel, so addressed, to the defendant, who carried it for hire to the address; but, on inquiring there for J. W., found that no such person lived or was known there. A week afterwards the defendant received a letter from St. Albans, signed J. W., and stating that a parcel had been addressed to him by mistake at 27, Great Winchester street, and requesting that it should be forwarded to him at a public-house at St. Albans. The defendant forwarded it accordingly; and it was claimed at St. Albans by a person calling himself W., who absconded with it. Lord Tenterden left it to the jury to say whether the defendant had delivered the box in the due course of his duty and business as a carrier; and they found a verdict and damages for the plaintiff. The court refused a new trial, and held the carrier liable to the consignor. Burrough, J., said: “At the outset, no doubt the contract was between the carrier

(k) 4 Bing. 476.

and consignee; but when it was discovered that no such person as the consignee was to be found in Great Winchester street, that contract was at an end, and the goods remaining in the hands of the carrier as the goods of the consignor, a new implied contract arose between the carrier and the consignor to take care of the goods for the use of the consignor." His Lordship added, that the circumstance of "no such person as the consignee having been ever heard of at the place to which the goods were addressed, ought to have awakened the suspicion of the defendants, and they were guilty of gross negligence in parting with them without further inquiry."

The delivery must either be at the actual residence of the consignee, or there must be a tender by the carrier tantamount to a delivery. A *bonâ fide* tender by the carrier will be sufficient; and the consignee cannot subsequently recover for a nondelivery. But where the carrier tendered the goods to the consignee, and then refused to deliver them because the latter was not ready with the hire; and then subsequently refused to deliver, not on the ground that he had made a sufficient tender, but on a claim of lien which proved to be unfounded; it was held, that his contract to deliver remained unperformed (*l*).

The delivery, according to the circumstances of the case, will be either to the actual consignee, as in the cases just stated; or to the owner, as in *Richards v. London and South Coast Railway*, and *Butcher v. London and South-Western Railway* (*m*), or at a specified terminus, or to an authorized agent. The carrier may deliver to the real owner of the goods, although he be neither the consignor nor the consignee (*n*), or to the lawful guardian of an infant consignee (*o*); but it is no answer to an action against a carrier by a consignee for nondelivery of goods, that the

(*l*) *Storr v. Crowley*, 1 M'Cle. & Yo. 129.

(*n*) *Sheridan v. New Quay Company*, 28 L. J. 58, C. P.

(*m*) *Supra*, p. 43.

(*o*) *Barker v. Taylor*, 1 C. & P. 101.

carrier has delivered them to the consignor; or that he has paid the consignor compensation for the loss of them (*p*). But if the carrier deliver in pursuance of his employment, without notice of the real owner's claim, the carrier is justified (*q*); and if he deliver to a wrong consignee, he may recover the value from the latter (*r*). Much also, in deciding whether there has been a delivery to the right person or at the right place, will depend upon the carrier's usual course of delivery, where it is such that the contract must be held to have been subject to it. Thus, in *Butcher v. London and South-Western Railway*, the company's course of delivery formed the basis of their liability. The trust had apparently determined as soon as the passenger stepped from the train on to the platform; but the company's course of business extended their liability beyond its ordinary terminus, until all the passenger's luggage was placed in the cab. So, in *Richards v. London and South Coast Railway*, Cresswell, J., said: "It cannot be said that the company fulfilled what they undertook, if they did not deliver the parcel: and if the usual course of delivery was on the other side of the platform, that would be the place at which they ought to deliver."

Where the carrier seeks to limit his liability by engrafting an usage of trade on his contract of delivery, such usage must clearly appear. This was settled in the Exchequer Chamber, in *Bourne v. Gatliffe* (*s*). There the first count of the declaration charged the defendant, as a special carrier for hire, with a duty to convey the plaintiff's goods, safely and securely, from Belfast to London, and to deliver them at the port of London, to the plaintiff or his assigns. The breach was nondelivery; and the defendant pleaded substantially, first, that he had safely unshipped and deposited the goods at Fenning's wharf, at

(*p*) *Coombs v. Bristol and Exeter Railway*, 3 H. & N. 1; 27 L. J. 269, Exch.

(*q*) *Sheridan v. New Quay Com-*

pany, *supra*, p. 49.

(*r*) *Vernon v. Hodgson*, 4 Taunt. 189.

(*s*) 3 Sco. N. R. 1.

the port of London; that the wharf was a fit and usual place for such goods to be deposited on; and that they were there accidentally burned. The plea was held to be bad, because it did not appear from it that there had been an actual delivery to the plaintiff or his assigns; nor a delivery according to the custom of London; nor that the plaintiff had notice of the arrival; nor that a reasonable time had elapsed within which the plaintiff might have removed the goods.

A second count charged the defendant with a duty to convey the goods safely to London, to take care of the goods when wharfed, and to deliver them within a reasonable time to the plaintiff; breach, nondelivery within a reasonable time. The defendant pleaded that he had wharfed the goods safely, and that, before a reasonable time had elapsed for the delivery, they were burned without any negligence on his part. This plea was held good, as the defendant, not being a common carrier, was bound to use only ordinary care. It was also held, that the judge was right in refusing at the trial to tell the jury that a delivery at Fenning's wharf was a delivery to the plaintiff; and that it was for them to say on the evidence, whether such a delivery was good, according to the usage of delivering goods in the port of London.

5. *A Common Carrier must accept goods for carriage within a reasonable time after they have been tendered to him, with a proper amount of hire; and must deliver them to the Consignee within a reasonable time (t).*

In *Crouch v. Great Western Railway (u)*, the declaration charged the defendants, as common carriers, with having refused to receive the plaintiff's goods for carriage, within a reasonable time after the plaintiff had tendered them, with the hire, to be carried. The plea set up the insuffi-

(t) *Golden v. Manning*, 2 W. Bl. 916. (u) 9 Exch. 556.

ciency of the hire tendered ; but it was held bad on the facts of the case, and the plaintiff had judgment.

“ The duty to deliver within a reasonable time is a term grafted by legal implication upon a promise or duty to deliver generally” (*x*). In that case goods had been intrusted to the defendants, who were common carriers, to be conveyed from London to Birmingham. They were delivered to the defendants in London on the 8th August ; and, notwithstanding repeated applications by the plaintiff, were not delivered at Birmingham until the 3rd September. The delay was caused by the direction having been accidentally destroyed ; but, in consequence of it, the plaintiff was unable to fulfil a contract with a third party. Some doubt was raised as to the sufficiency of the declaration ; but the defendants were held to be liable for the delay.

It was stated in this case, that the onus of proving a delivery within a reasonable time lies with the carrier ; and it seems that he is only bound to deliver goods within such a time as, according to the ordinary course of his business, appears to be reasonable. Where the defendants had contracted to carry fish for the plaintiff, and had stipulated only to deliver within a reasonable time, but had been accustomed to carry fish previously for the plaintiff by a certain train : it was held, that they were liable for the delay in delivery, which was caused by a negligent omission to forward the truck, in which the plaintiff’s fish was, by the usual train (*y*). It seems from this case, that a contract to deliver within a particular time may be inferred from a carrier’s ordinary course of business.

There is a distinction between the implied contract of a common carrier to carry passengers within a reasonable time, and his contract to carry goods or cattle ; and in both cases the measure of negligence depends on the tariff. In the carriage of passengers, the carrier is bound to use

(*x*) Per Tindal, C. J., *Raphael v. Pickford*, 5 M. & G. 558.

(*y*) *Wren v. Eastern Counties Railway*, 1 L. T. Rep., N. S. 5, Q. B.

extraordinary efforts to convey them within the usual time ; and to incur additional expense for that purpose, because they pay a higher fare than is paid for the conveyance of cattle or goods. But in the carriage of goods or cattle, for which a lower fare is usually paid, the carrier is not bound to use extraordinary efforts, nor to incur additional expenses, in order to deliver within the usual time ; and if a snow storm, or similar obstruction, delay the carrier, in the latter case, he will be excused. The common carrier's contract of insurance in both cases does not necessarily include a contract to deliver within a specified time ; but in all cases where he is charged with delay in delivering, it is a question for a jury whether, under all the circumstances of the case, the delay was reasonable, or whether it arose from his negligence ; and, according to the verdict, he will be liable, or discharged from liability for delay (z). The liability of carriers for delay, under the limitations of special contracts, will be treated in a subsequent chapter (a).

(z) *Briddon v. Great Northern Railway*, 28 L. J. 51, Exch.; Cf. *Pole v. Cetcovitch*, 3 L. T. Rep. 438.
Golden *v. Manning*, 2 W. Bl. 916; (a) See Chapter VIII.

CHAPTER V.

THE COMMENCEMENT, DURATION, AND TERMINATION OF
A CARRIER'S LIABILITY. BOOKING-OFFICE KEEPERS.

THE general view of a carrier's duties and liabilities, as contained in the preceding chapter, may have sufficed, it is hoped, to have conveyed a correct and practical idea both of their duration and of their extent; but these incidents will be considered more in detail in the present and the following chapter.

A carrier, according as he is a common or special carrier for hire, becomes liable—in the first case as an insurer, and in the second case as a bailee liable for negligence—the instant that he receives goods for carriage into his custody from the bailor (*a*). There must be a delivery from the bailor, and an acceptance by the carrier, before the liability of the latter begins; but it begins as soon as there is an actual or constructive delivery by the bailor or his agent, and an actual or constructive acceptance by the carrier or his agent.

When a carrier, in an action for loss of goods, pleads that they were not delivered to him, the plaintiff must show that he actually delivered them to the defendant, or to an authorized agent of the defendant. Thus, in *Griffiths v. Lee* (*b*), the consignor proved that he gave the parcel to the defendant's coachman, and that it was directed to the plaintiff. This was held to be sufficient *prima facie* evidence of a delivery to the defendant.

Where the carrier denies that goods were ever delivered to him, it is for a jury to say whether, on all the circum-

(*a*) *Lee, C. J., Dale v. Hall*, 1 Wils. 219.

282; *Fragrano v. Long*, 4 B. & C. (*b*) 1 Car. & P. 110.

stances of the case, there was an actual or constructive delivery to him. Where goods were brought by one carrier, and discharged on the wharf of the defendant who was also a carrier, to forward on to the plaintiff; it was held, that it was for the jury to say whether the custom of the first carrier to discharge goods on the defendant's wharf, and an acknowledgment by the defendant's agent that the goods in question had arrived for the defendant, did not constitute a sufficient constructive delivery to the defendant (*c*). But a mere delivery of goods at an inn where a carrier lodged, and where he was told that he would find them, has been held to be no delivery (*d*).

If the owner expressly agree to accompany the carrier and take care of the goods, the latter will not be liable. Thus, in *Brind v. Dale* (*e*), where the plaintiff hired a town carman, who plied only occasionally for jobs, and whom Lord Abinger, C. B., therefore, held to be only a special carrier for hire; his Lordship told the jury, that if "the goods were put into the cart under a modified contract that the plaintiff should go with them and take care of them, the carrier would not be liable." In this case the defendant's servant had said to the plaintiff when the latter hired him, "Don't you leave me; I cannot leave the horse to look after the goods;" and the plaintiff said, "I shall go along with you to look after the goods." This evidence, under the above direction, was held to support a verdict on one of the issues for the defendant, on the ground apparently that there had never been any complete delivery to the carrier.

It must not be inferred from this case that there can be no complete delivery to the carrier in cases where the passenger merely accompanies his goods: nor even in ordinary cases, where, as a passenger, he retains them in his custody during the carriage (*f*). It appears to have

(*c*) *Quigger v. Duff*, 1 M. & W. Raym. 46.

174.

(*e*) 8 C. & P. 207.

(*d*) *Selway v. Holloway*, 1 Lord

(*f*) See *supra*, Chapter IV., p. 43.

been thought, in *Brind v. Dale*, that the evidence there warranted the jury in finding an express contract between the owner and the carrier, by which the former was held to retain the possession and custody of the goods, even while they were in the hands of the carrier. But a carrier cannot contend successfully that goods have not been bailed to him merely because the owner accompanies them in the transit; nor even on the ground that the owner has never parted with the manual possession of them; for the acquiescence of the carrier in the retention of possession by the owner, will generally suffice to charge the carrier, from the commencement of the transit, as entirely as if the goods had been then actually delivered into his custody. Thus, in *Richards v. London and South Coast Railway*, and *Butcher v. London and South-Western Railway (g)*, the facts ostensibly created even a stronger presumption than in *Brind v. Dale*, that there had been no delivery to the carrier. The owner in each case never lost sight of the chattel, nor in any way parted with the visible and manual custody of it at the commencement of the transit. But in both cases there was manifestly held to have been a complete delivery to the company at that point of time; and the presence of the owner in no way lessened the carrier's liability as after an actual delivery to him. In the second case, *Cresswell, J.*, seems to have thought that it might have been well left to the jury to say whether, under the circumstances, there had been a delivery to the carriers; but as the question had not been put, it was necessary to assume that there had been originally a delivery.

The place at which the goods were delivered to the carrier ought to be accurately stated in the declaration; but a variance in such a case is unimportant. Where the declaration described the place at which the goods were delivered as "Chester, in the county of Chester," and it appeared from the evidence that Chester is a county in

(g) *Supra*, pp. 42, 43.

itself, and that the proper description would have been "Chester, in the county of the city of Chester," the variance was held immaterial, even before 15 & 16 Vict. c. 76, s. 222 (*h*).

Delivery to Agents and Booking-office Keepers.

A delivery of goods by the consignor to a booking-office keeper, or other agent authorized to receive goods for the carrier, will constitute a good delivery to, and acceptance by, the latter. The agency must be proved by the party who relies on it as evidence of a delivery.

In *Burrell v. North* (*i*), the action was against a carrier for the loss of a parcel. A witness proved that such a parcel was left by the plaintiff at her husband's house to be carried by the defendant, and that she was in the habit of receiving goods for the defendant to carry. This was held sufficient proof of the witness's agency, and of a delivery to the defendant. Erle, J., said: "If the defendant allow these persons to receive parcels to be conveyed by him as a carrier, that is quite enough."

But the mere fact that a booking-office, or other receiving-house, is in the habit of taking in parcels, and of forwarding them by a particular carrier, will not necessarily constitute the booking-office keeper an agent for the carrier, nor create such a privity of contract between the owner and the carrier, as will render the latter personally liable for loss or damage.

Accordingly, where goods have been intrusted to a booking-office keeper to be carried, it is often a difficult question to determine, whether he is acting as a principal, or simply as an agent for the carrier; and, in determining the party against whom an action can be successfully brought for loss or damage, the closest attention must be paid to the circumstances of each case, in order to decide

(*h*) *Woodward v. Booth*, 7 B. & C. 301. (*i*) 2 C. & K. 680.

whether it is to the booking-office keeper, or to the carrier, that the owner should look for compensation.

If a booking-office keeper, as such, receive goods to be forwarded by a carrier, he will not be liable, without negligence, for damage or loss; for he is not himself a common carrier, and does not insure against loss (*l*). And where goods were deposited with a person who acted generally as a booking-office keeper for different carriers, but who did not appear to be paid for his trouble, nor to have any fixed course of dealing; it was held, that the mere fact of a loss from such custody was not enough to charge him (*m*).

Whenever it is sought to charge a booking-office keeper as a carrier, or as an agent for a carrier, it must be clearly proved that he has acted as such. In *Upston v. Slark*, the declaration was against the defendant as a common carrier for the loss of a parcel; and it appeared that he kept a booking-office in Piccadilly, at which parcels were booked for various coaches and waggons to different places. On the door was painted "conveyances to all parts of the world," followed by a list of places, including that to which the parcel was booked. Lord Tenterden, C. J., did not think this sufficient evidence to charge the defendant as a common carrier, and said: "We know that there are places in this town, booking-offices, that do not belong to carriers; and I am clearly of opinion that you cannot convert the keeper of a booking-office into a carrier."

But, although a booking-office keeper is not an insurer, he will be liable as any ordinary bailee for hire if loss arise from his negligence. In *Williams v. Gusey* (*n*), there does not appear to have been any evidence that the booking-office keeper was a bailee for hire; and it may be presumed that he was not. Accordingly, it has been held that, if it appear that the booking-office keeper was paid

(*l*) *Newbon v. Just*, 2 C. & P. 76; (*m*) *Williams v. Gusey*, 5 Sc. 57.
and *Upston v. Slark*, *ib.* 598. (*n*) *Supra*.

for the custody, and for his undertaking to forward the goods by a carrier, he will be liable for damage by negligence on proof that they were never delivered to the carrier (*o*). It is also held, that a booking-office keeper who receives hire "is bound to take care of the things given into his custody by putting them into a safe place" (*p*). And where the defence for a loss was that the goods had been left exposed in the house because they were of an inconvenient size, it was held no justification (*q*).

Where the booking-office keeper is found to be the authorized agent of the carrier, the latter is clearly liable for the negligence of the former; and it appears that the booking-office keeper may also be rendered liable (*r*). In *Colepepper v. Good*, the booking-office keeper, who was found to be an authorized agent of the defendant, a carrier, had misdirected the plaintiff's chest: or had suffered it to be misdirected while in his custody; and the defendant had delivered it according to the misdirected address. The defendant was held liable for the negligence of the booking-office keeper. Gaselee, J., said: "If a carrier has directed goods to be sent to a particular place, I think that the party sending them has, in point of law, a remedy against him for any misconduct on the part of the booking-office keeper. . . . And I agree that, when a booking-office keeper has misconducted himself, the party injured may maintain an action against him." But, if a person take goods to the carrier's booking-office, and refuse to pay the charge demanded for booking, the carrier will not be liable if the owner leave the goods and they are lost (*s*).

When it is sought to charge the booking-office keeper for the loss of goods which have been intrusted to him for the purpose of being forwarded by a carrier, it must be

(*o*) *Newbon v. Just*, 2 C. & P. 77.

(*r*) *Gaselee, J., in Colepepper v.*

(*p*) *Park, J., Dover v. Mills*, 5 C.

Good, 5 C. & P. 380.

& P. 175.

(*s*) *Peake's Add. Cas.* 185.

(*q*) *Ibid.*

proved that there was a loss or damage while they were in his custody: and it will not be enough to show merely that they never reached the consignee. Thus, where the defendants were general booking-office keepers, and received goods, with a payment for booking, from the plaintiff, to be forwarded by a carrier, but no particular conveyance was named; the plaintiff was held to be rightly nonsuited, on showing merely that the goods never reached their address, because the only duty of the defendants was to deliver to a carrier (*u*).

If there be no privity between the booking-office keeper and the carrier, the former will be personally responsible for the goods up to the time of the delivery to the carrier; but the liability of the latter will begin as soon as he is fixed with the acceptance of the goods, or as soon as they are traced into the hands of his authorized agent; and it will make no difference as to his liability, that the goods have passed through the hands of several sub-agents on their way to the carrier, if the evidence satisfy the jury that such sub-agents were acting, expressly or impliedly, by the authority of the carrier. This doctrine is well illustrated in *Syms v. Chaplin* (*x*).

There the plaintiff addressed a parcel to London, and paid for booking generally at A. The postmaster at A. had been accustomed to receive such parcels and forward them by B., the driver of the mail cart, to C. B. had been accustomed, after receiving such parcels from the postmaster, to deposit them at C. with D. At C. the mail coach of the defendants had been in the habit of stopping to receive parcels from D. This was the course in the present case; and the coachman paid D. for the carriage of the parcel from A. to C., and charged it on to the defendants. D. was found on this evidence to be a receiver for the defendants, although he had never been expressly authorized to act for them, and although he was

(*u*) *Gilbert v. Dale*, 5 Ad. & Ell. C. P.

543; *Midland Railway Company v. Bromley*, 17 C. B. 372; 25 L. J. 94, (x) 5 Ad. & Ell. 634.

under no obligation to send the parcel by the coach of the defendants rather than by any other carrier. The court approved of this verdict. Lord Denman, C. J., said: "A carrier, receiving goods, undertakes to carry them to the person whose address is upon them; the fact of their coming to him through a series of agents does not prevent his being liable to the sender. He cannot throw back the liability upon the earliest agent."

It will be noticed that in this case the plaintiff was the consignor; and that there was, therefore, an apparent infringement of the rule, which will be considered later, that, as in general the property of goods passes from the consignor to the consignee by delivery to the carrier, the consignee, and not the consignor, is the proper plaintiff in the event of loss (*y*). But in *Syms v. Chaplin* and other cases, the plaintiff apparently was consignee as well as consignor; or the goods were at the risk of the consignor, who therefore retained his right to sue (*z*).

The liabilities of carriers for the acts of their booking-office keepers or other receivers are also subject to 11 Geo. 4 & 1 Will. 4, c. 68 (the Carriers Act). The fifth section enacts:—"That for the purposes of this Act every office, warehouse or receiving-house, which shall be used or appointed by any mail contractor or stage-coach proprietor or other such common carrier as aforesaid for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving-house, warehouse or office of such mail contractor, stage-coach proprietor, or other common carrier: and that any one or more of such mail contractors, stage-coach proprietors, or common carriers, shall be liable to be sued by his, her or their name or names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package or person, shall abate for the want of joining any co-proprietor or co-partner in such mail, stage-coach, or other public conveyance by land for hire as aforesaid."

(*y*) *Dawes v. Peck*, 8 T. R. 330. Finn. 600; *Sheridan v. New Quay*

(*z*) *Dunlop v. Lambert*, 6 Cl. & Company, 28 L. J. 58, C. P.

It has been held, under this section, that a delivery to a carrier's servant, who had been sent to receive the goods from the consignor, is a good delivery to fix the commencement of the carrier's liability (*a*). And if a message be left, at the carrier's booking-office, to send for goods, and the carrier send to receive them; his liability will be the same as if they had been delivered at the booking-office (*b*).

It was decided before the Act, that a contract of carriage made by one of several joint proprietors as carriers binds all who were partners at the time, and all who subsequently become partners (*c*).

The Duration and Termination of a Carrier's Liability.

A carrier's liability runs from the moment of delivery and acceptance by him, or his agent, until the moment when he delivers the goods, actually or constructively, to the consignee, or at the stipulated place of consignment (*d*). His liability ceases as soon as he has fulfilled either of these conditions (*e*).

The great practical difficulty in determining when a carrier's liability has terminated, lies in the difficulty in determining when he has made a complete delivery. As soon as the delivery is complete the bailment is at an end, and the carrier's liability ceases. It is obvious, therefore, that in the majority of cases the time at which his liability ends can only be ascertained by considering and defining the circumstances, and the express or implied elements of the original bailment. A complete delivery, and a terminated liability, are in this case synonymous and convertible terms; but the facts which render it allowable to deny or to affirm either proposition in the case of a bailment to a carrier, are subject to rules of the utmost nicety.

(*a*) *Boys v. Pink*, 8 C. & P. 361.

(*b*) *Davey v. Mason*, C. & M. 45.

(*c*) *Helsby v. Mears*, 5 B. & C. 504; 8 D. & R. 289.

(*d*) *Fowles v. Great Western Railway*, 7 Exch. 699; 22 L. J. 76, Exch.

(*e*) *Richards v. London and South Coast Railway*, 7 C. B. 839.

The question in every case must be—what was the express contract, if there was an express contract? or what was the implied contract, if the bailment originated without an express contract? The common law requires the carrier to deliver the goods to the consignee, or at the place to which they are addressed. Thus, in *Forward v. Pittard* (*f*), the goods were delivered to the carrier on a Thursday, and by the course of travelling could not be delivered until the following Saturday. They were burned accidentally on the intervening Friday, and the carrier was held clearly liable.

In *Garside v. The Proprietors of the Trent and Mersey Navigation* (*g*), the plaintiff, wanting to send goods from A. to C., hired the defendants, as common carriers, to carry them to an intermediate stage, B.; and the defendants also agreed to warehouse the goods without charge at B., until they could be delivered on to the C. carrier. Here, also, the goods were accidentally burned while they were so warehoused, and before there was any opportunity of delivering them to the C. carrier. It was held, that the liability of the defendants, as carriers and insurers, had ended on the arrival of the goods at B.; that their liability, as warehousemen, was a totally distinct liability; and that as the warehousing was gratuitous, and for the convenience of the plaintiffs, they were not liable without negligence.

Here, then, the exemption from liability was founded on the broad and common distinction which exists between a contract to carry, and a contract merely to warehouse after the virtual termination of the transit (*h*).

But this distinction becomes clouded by the almost immediately subsequent case of *Hyde v. Trent and Mersey Navigation Company* (*i*). There, also, the defendants, as common carriers for hire, undertook to carry the plaintiff's goods from A. to C.; and the plaintiff knew that, in the transit, the goods would necessarily pass through B. and

(*f*) 1 T. R. 27.

(*h*) *Supra*.

(*g*) 4 T. R. 581.

(*i*) 5 T. R. 389.

be warehoused there ; and that beyond B. the defendants were merely acting as agents for third persons, to whom they were accountable for the profits of the carriage beyond B. The goods, on their safe arrival at B., were placed by the defendants in the warehouse of one of such third persons, and there burned accidentally. The defendants were held liable, on the ground that, as there had been originally one payment for the whole distance, there was one indivisible contract and continuing liability, on the part of the defendants, to deliver safely at C.

The principle established by this case, as distinguished from that which precedes it, is that where there is a payment, or a charge, in the first instance, for carriage beyond the known limits of the carrier's transit ; the carrier's liability extends beyond such limits up to the ultimate point at which the final delivery is to be made. In *Garside v. Proprietors of the Trent and Mersey Navigation*, the contracts of carriage and warehousing were held distinct, partly on the explicit understanding between the contracting parties ; but chiefly because the warehousing was gratuitous, and because it was not necessarily included within the ordinary transit.

Accordingly, the distinction between the liabilities of a common carrier, and of a warehouseman as such, was treated as fully established in *Re Webb and others (k)*. There, in consideration that S. would employ Webb and his partners as common carriers for hire, they promised to warehouse the goods of S. at the end of the transit, without charge, until it should be convenient for S. to send for them ; and it was held that a payment, in the nature of an insurance, made to S. by Webb for the goods, which were accidentally burned while in the warehouse, did not entitle him to contribution from his co-partners, because the liability of the partners as warehousemen was totally distinct from their liability as carriers ; and that, as they must be held to have been acting in the former capacity,

(k) 8 Taunt. 443.

when the goods were burned, they were not liable on a gratuitous bailment, and without negligence.

Hence, where there is a distinct understanding or usage that goods are to be warehoused at the end of the transit until they can be delivered to the consignee, the liability of the carrier ends at the moment when they pass from his hands into the custody of the warehouseman (*l*); and if the goods are injured in their transmission from the carrier to the warehouseman, the latter will be liable, it is said, if he accept them in their damaged condition (*m*). But there must be a complete delivery to the warehouseman or a wharfinger, such as would enable the owner to sue the latter for a subsequent loss; and the carrier's liability will not determine otherwise (*n*). But as soon as the goods are actually delivered to the warehouseman, the carrier's liability ends; and the warehouseman becomes liable, not as an insurer, but as an ordinary bailee for hire (*o*), for the value of the lost article, but not for damages arising from the loss. Thus, where a commercial traveller lost a case of patterns from the left luggage room of the defendants, and had to wait fifteen days before he could obtain another case; he was held not to be entitled to his expenses while waiting the fifteen days, nor for compensation for his loss of time (*p*).

When the carrier and the warehouseman are different and unconnected persons, there is little practical difficulty in determining when the liability of the former ends, and that of the latter begins; but the difficulty is when the carrier and the warehouseman are the same person. In such a case the unity or divisibility of the liability will depend, as already stated, on the unity or divisibility of the original contract; and where the money consideration

(*l*) *Thomas v. Day*, 4 Esp. 263.

(*m*) *Ibid.*

(*n*) *Buckman v. Levi*, 3 Camp.
414.

(*o*) *Randleson v. Murray*, 8 Ad.

& Ell. 109; *Cailiff v. Danvers, Peake*,
N. P. Cas. 155.

(*p*) *Henderson v. South-Eastern*
Railway, 9 W. R. 519.

can be made to apply to the whole transaction, the courts have shown a disposition to treat the contract as one and entire; at least so far as to hold the carrier liable, in the nature of a bailee for hire, as a warehouseman, even though he be in that capacity nominally a gratuitous bailee, provided that the original consideration for the carriage can be made also to imply a promise to warehouse safely. Thus, where the defendants carried as common carriers for the plaintiff, and offered to deliver; but the plaintiff sent back the goods to the defendants' warehouse, there to await his orders, and the goods were subsequently lost: the defendants were held liable as warehousemen, because the original consideration for the carriage appeared to include an adequate remuneration for the warehousing, although it was not to be charged for. Lord Abinger, C. B., said: "A distinction has been properly drawn between the duties of a carrier and of a warehouseman. But the party may have so large a compensation as a carrier as to be sufficient also to remunerate him for acting as warehouseman, as is the case with many of the canal companies; and it is quite consistent with both these characters that he will, for a certain time, until further orders, or for a reasonable time, keep the goods, considering the general remuneration for carrying sufficient to cover this risk also" (9). It will be observed, that in this case there was no attempt to charge the defendants as carriers, but only as warehousemen; and their liability in the former capacity had clearly determined when they tendered the goods to the plaintiff before they were sent back.

When the delivery to the consignee is to be beyond the limits of the carrier's transit, his liability may either terminate with a delivery over to a carrier, authorized to forward on; or it may be prolonged up to the moment when the goods are delivered to the consignee. But, in the absence of an agreement to the contrary, if a carrier receive goods which are addressed to a place beyond the terminus of his

(9) Cairns v. Robins, 8 M. & W. 258.

transit, he will be liable beyond such terminus, and until they have been delivered at the ulterior and ultimate point. This doctrine is clearly the result of all the latest cases.

Thus, in *Muschamp v. Lancaster and Preston Junction Railway (r)*, the defendants, as common carriers, received a parcel directed to Bartlow, a place beyond Preston. The railway of the defendants ended at Preston. The agent of the defendants was requested to book the parcel, and was offered the charge for the whole distance; but he replied that it had better be paid on receipt by the consignee. The parcel arrived safely at Preston, and was there forwarded on by another railway. It was lost on this part of the transit. Rolfe, B., told the jury that "when a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, that is *primâ facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed; and that the same rule applied although that place were beyond the limits within which he in general professed to carry on his trade of a carrier." The court held this direction to be correct, and supported a verdict for the plaintiff. Lord Abinger held, that there was evidence for the jury of a contract by the defendants to carry the whole distance; and attached some importance to the fact that the charge was to be paid in one sum at the end of the whole distance. His Lordship also distinguished the case of a carrier from that of a contract with a booking-office keeper, who is discharged as soon as he has delivered the goods to the carrier. His Lordship added: "In cases like the present, particular circumstances might no doubt be adduced to rebut the inference which *primâ facie* must be made of the defendants having undertaken to carry the goods the whole way. The taking charge of the parcel is not put as conclusive evidence of the contract sued on by the plaintiff; it is only *primâ facie* evidence of it; and it is useful and reasonable

(r) 8 M. & W. 421.

for the public that it should be so considered. It is better that those who undertake the carriage of parcels for their mutual benefit should arrange matters of this kind *inter se*, and should be taken each to have made the others their agents to carry forward."

This case was followed by *Watson v. Ambergate, Nottingham and Boston Railway Company(s)*. There the defendants were held liable for damages arising from the detention of the plaintiff's goods on an ulterior railway, by which the goods were forwarded on. This case is remarkable for the fact, that the plaintiff had been expressly told, at the time when he delivered the goods to the defendants, that they could receive payment only for the transit to their own terminus; but there was some evidence that their agent had told the plaintiff that the goods would arrive in time at their ultimate destination. The court confirmed the principle, that the ulterior railway must be taken to have been acting as agents of the defendants, and that there was evidence of an original contract by the latter to carry the whole distance. Erle, J., stated the rule shortly to be that, "where goods are received at one terminus for conveyance to another, the company are answerable for all the intermediate termini; and the receipt of such goods is *primâ facie* evidence of liability."

In *Scothorn v. South Staffordshire Company(t)*, the plaintiff had paid carriage for the whole distance of goods consigned to the defendants to be delivered on shipboard in London. The defendants, according to their course of business, forwarded them from their terminus at Birmingham, by the London and North-Western Railway to London. After the arrival of the goods at London, but before they had passed out of the hands of the London and North-Western Railway, the plaintiff gave a countermand of the delivery to the agent of the latter railway. The goods were, notwithstanding, put on board the ship by

(s) 15 Jur. 448.

(t) 8 Exch. 341; 22 L. J. 120, Exch.

the defendants and were afterwards lost. It was contended for the defendants, that the agent of the London and North-Western Railway was not an agent for the defendants to receive a countermand, but only to forward on the goods, as he had in fact done, to their address. But the court held, that the London and North-Western Railway were agents of the defendants for all the purposes of the original contract; and that one of its essential elements was a right of countermand retained by the sender during the whole transit. It will be observed, that this case is clearly distinguishable from cases in which the carrier's agent exceeds his authority, by incurring a liability which the carrier has previously repudiated by a distinct contract with his employer (*u*).

In *Collins v. Bristol and Exeter Railway* (*x*), the general doctrine was admitted; but questions arose under the terms of a special contract, by which the Great Western Company, on receiving the plaintiff's goods to be carried to Torquay, stipulated that they would not be answerable for loss by fire, nor for any loss, or damage, beyond the limits of their local regulations for delivery: and that beyond those limits they undertook only to forward the goods "to their destination by a public carrier, or otherwise as opportunity may offer." The goods were conveyed to Bristol where the line of the Great Western Company ends, and that of the defendants begins; and were then transferred on the same truck, which belonged to the Great Western Company, and which remained under the charge of the same guard, also a servant of the Great Western Company, to the line of the defendants, in order to be conveyed to Exeter, and there delivered on to the South Devon line, by which they were to be conveyed to Torquay. At Exeter, the goods, while still on the truck of the Great Western Company, were burned, without negligence on the part of the defendants. The only question reserved was, whether

(*u*) See *Slim v. Great Northern Railway Company*, 23 L. J. 166, C. P. 14 C. B. 647; (*x*) 25 L. J. 185, Exch.

the terms of the special contract exempted the defendants from liability; and this was decided affirmatively, on the principle that the special contract would have protected the Great Western Railway for the whole distance, and therefore that it protected the defendants. This judgment was reversed in the Exchequer Chamber (*y*), where it was held, that the special contract only protected the Great Western Railway: that that railway was merely an agent of the plaintiff to forward on the goods: and that the defendants were liable for the loss by the fire as common carriers. But this judgment was itself reversed in the House of Lords (*z*), where the judgment of the Court of Exchequer was confirmed: and the House of Lords also held that it was competent for them to declare—as they declared accordingly—that there had been no contract between the plaintiff and the defendants, but only between the plaintiff and the Great Western Railway; or that if there had been any contract with the defendants the special condition protected them. The result, therefore, of this case is to establish the doctrine of the cases which have been cited as preceding it.

To the same effect is *Wilby v. West Cornwall Railway* (*a*), where the railway of the defendants extended only from Penzance to Truro: and the defendants, as common carriers, contracted to carry the plaintiff's goods to Wolverhampton. At the terminus of the line of the defendants they shipped the goods in a steamer to Bristol, in order that they might be forwarded to Wolverhampton. When shipped they were sound and undamaged; but when they were delivered at Wolverhampton they were damaged. The defendants were held to be liable.

So, where the plaintiff booked through from a railway to a terminus, between which and the point of departure an intermediate railway formed part of the road: it was

(*y*) 1 H. & N. 517; 26 L. J. 103, Exch. (*a*) 2 H. & N. 703; 27 L. J. 181, Exch.

(*z*) 29 L. J. 41, Exch.

held, that there was only one contract, which was entirely between the plaintiff and the first railway for the whole distance: and that the intermediate railway was not liable to the plaintiff for the loss of his luggage on that part of the line; although the first railway was also free from such liability under the clause of its private act (*b*). Here the plaintiff was held to be without remedy of any kind.

So, where the plaintiff had contracted with railway carriers for the conveyance of cattle to a terminus, which was beyond the limits of the railway; and which, beyond those limits, had to be reached by the ulterior and intermediate railway of the defendants: the contract was held to be with the first railway for the entire journey; and the defendants, as mere agents, were declared not to be liable (*c*).

Where there is an express contract between the carrier and the employer, the duration of the carrier's liability will depend on the terms of it; and may therefore end at a point of time which falls far short of the implied common law duty. Generally, no doubt, there must be an actual or constructive delivery by the carrier to the consignee at the address; but where a carrier undertakes expressly only to carry to the ordinary terminus of his transit, and stipulates that, without longer liability, he shall there transfer the goods to an ulterior carrier for the purpose of being forwarded and delivered to the consignee: the first carrier will not be liable for any damage which the goods may sustain before delivery, while they continue in the custody of the second and ulterior carrier (*d*).

A carrier, who undertakes to receive goods at a place within the realm, and to deliver them at a place out

(*b*) *Mytton v. Midland Railway Company*, 4 H. & N. 615; 28 L. J. 385, Exch.

(*c*) *Coxon v. Great Western Railway*, 5 H. & N. 274; 29 L. J. 165, Exch.

(*d*) *Fowles v. Great Western Railway Company*, 7 Exch. 699; 22 L. J. 76, Exch.; *Coxon v. Great Western Railway*, 5 H. & N. 274; 29 L. J. 165, Exch.

of the realm, or beyond seas, may be a common carrier, and, as such, subject to all ordinary liabilities up to the time of delivery beyond the realm.

Thus, where the terminus of the transit was out of England, it was held that that circumstance did not in any way lessen the carrier's liability (*e*).

(*e*) *Crouch v. London and North-Western Railway*, 14 C. B. 255; 23 L. J. 73, C. P.; *Benett v. Peninsular and Oriental Company*, 6 C. B. 775; 18 L. J. 85, C. P.; *supra*, p. 19; *Scothorn v. South Staffordshire Railway*, *supra*, p. 68.

CHAPTER VI.

THE EXTENT OF THE LIABILITY OF COMMON CARRIERS AT
COMMON LAW FOR THE LOSS OR DAMAGE OF GOODS.
THE ACT OF GOD—KING'S ENEMIES—CONCEALMENT—
FRAUD.

IT has been stated already, in the course of this treatise, that a common carrier is, at common law, absolutely liable as an insurer for the safe conveyance and delivery of the goods intrusted to his care; and that generally, in an action against him for loss or damage, it will be no defence that he has taken every practicable care of them; nor that the loss or damage has been caused, without his fault, by unavoidable accident. But even the liabilities of an insurer are not unlimited; and, in the case of a common carrier, his implied contract of insurance was always subject at common law to two cardinal exceptions, either of which sufficed to relieve him from liability for loss or damage. The first case is where such loss or damage arises from what is called the act of God; that is, from the occurrence of such uncontrollable physical phenomena as, without being necessarily either supernatural or preternatural, arise from such an interruption of the ordinary course of nature as a prudent and honest man cannot reasonably be expected to provide against, or to anticipate. "By inevitable accident, commonly called the act of God, is meant any accident produced by any physical cause which is irresistible; such as a loss by lightning or storms; by the perils of the sea; by an inundation or earthquake; or by sudden death or illness" (a). Lord Mansfield defined the act of God to mean "something in opposition to the

(a) Story on Bailments, s. 25.

act of man;" such as "could not happen by the intervention of man, as storms, lightning, and tempests;" and observed in the same case, that "there is a nicety of distinction between the act of God and inevitable necessity" (*b*).

There is an ambiguity in these definitions which the cases do not disperse satisfactorily; but the following points appear to be settled. When the carrier relies on the "act of God" as a defence against liability for damage, the cause of such damage must have been, in accordance with Lord Mansfield's language, the "act of God in opposition to the act of man;" that is, it must appear to have been the result of some unusual irregularity in the laws of the physical world. A miraculous interposition of the Deity, or of some supernatural agency, would of course be comprised in the legal signification of the phrase; but this signification is strictly and best confined to such variations in the ordinary laws of nature as cannot be reasonably made the subject of foresight and calculation. A thunderstorm cannot be predicted twenty-four hours before it breaks; nor, even if it could, would it be reasonable that a carrier should be liable in the improbable and inevitable event of a flash of lightning consuming his consignment. But a thunderstorm, although comparatively a rare occurrence, and a deviation from the usual routine of natural phenomena, is not a sufficient variation from such routine to allow it to be regarded as the act of God; although the destruction of goods by lightning, as being a description of damage against which no foresight can guard, would be held to be included in the exception. The same reasoning applies to earthquakes, to hurricanes, and to unusually violent tempests. So it is probable that if goods of a perishable nature became deteriorated during the transit, from atmospheric, or other physical causes against which a carrier could not be expected to provide; as if grain became mildewed, or disease showed itself in potatoes which had been consigned to the carrier in a sound condition;

(*b*) *Forward v. Pittard*, 1 T. R. 33.

although the fact of their damage would constitute a *prima facie* liability in the carrier, it would be open to him to show that the damage arose from inevitable physical causes, and so to free himself from liability.

But where the damage is caused by even an inevitable accident, which arises from human infirmity or oversight, and not merely from the exceptional or intrinsic irregularity of a natural law, the carrier will be liable. If it arise from a road being out of repair; from a bridge breaking down; from fire; or from the violence of robbers or pirates; all such accidents, although in many cases apparently inevitable, are no defence for loss or damage in an action against a common carrier. The principle of the distinction is clear. No human art nor ingenuity can foresee or avoid the instantaneous violence of lightning, earthquakes, or tempests. But a superlatively prudent carrier might, and, in point of law, ought to ascertain that a road is in repair; that a bridge or a vehicle contains no latent defect; and that the country, through which he passes, is free from robbers, or provided with a sufficient police. If he do not take the precaution of previously ascertaining these facts, there is nothing unreasonable in holding him liable for any damage which may arise from the omission; and the premium and temptation to carriers to be careless and fraudulent towards their employers would be irresistible, if the occurrence of an accident, which might have been prevented by human agency, were held to contain its own justification or excuse. On this ground, if goods are burned accidentally at the end of the transit, but before delivery to the consignee, the carrier is held liable (*c*). But if the transit be prevented by the freezing up of a river or a canal; this, according to the American law, is held to be an intervention of a divine or natural impediment, which will justify delay, non-delivery, and even loss (*d*).

(*c*) *Hyde v. Trent and Mersey Navigation Company*, 5 T. R. 389; (*d*) *Story on Bailments*, s. 511; *Angell on Carriers*, s. 160.
Gatliffe v. Brown, 4 Bing. N. C. 314.

It is difficult, however, to conceive this last doctrine to be law. The principle of all the cases which range under the head "act of God," rests clearly on the natural inability of men to foresee and provide against them. The variations of the seasons are subject generally to fixed laws of regular recurrence; and if a carrier in the month of January, in England or America, were to contract absolutely to carry goods, it is difficult to see how the circumstance of a frost setting in, and freezing up a canal, or rendering a road impassable by snow, would justify in any way the nonperformance of the contract. It is a principle of law that the mere physical inability to perform a contract will not justify a breach (*e*). And it is presumed that no physical contingency which can be regarded reasonably as an ordinary incident of a particular season, will, in the absence of a special stipulation, afford any defence for the nonperformance of a contract to carry (*f*).

"If a party lay a charge upon himself by his own contract, he is bound to perform the stipulated act, or pay damages for its nonperformance. It is the duty of the contracting party in such cases to provide against contingencies; and he will be presumed to have known when he contracted whether the completion of the duty was within his power or not" (*g*). Even where the performance of a contract is *ultra vires*, as involving a breach of moral or positive law (*h*); it is not therefore void because its performance becomes naturally impossible, unless it were so at the time when the contract was made (*i*).

(*e*) *Brown v. Royal Insurance Society*, 28 L. J. 275, Q. B.; *Hall v. Wright*, 29 L. J. 43, Q. B.; *Sc. Cam. Beechey v. Brown*, 29 L. J. 105, Q. B.

(*f*) *Schilizzi v. Derry*, 24 L. J. 193, Q. B.; cf. *infra*, p. 78.

(*g*) Chitt. Cont. 5th ed. 55; and see *Ib.* 634, 635; Selwyn, N. P. 494, 12th ed.; cf. cases, *supra*, note (*e*).

(*h*) *Mayor of Norwich v. Norfolk Railway*, 4 El. & Bl. 397; 24 L. J. 105, Q. B.; *Bostock v. North Staffordshire Railway*, 4 El. & Bl. 798; 24 L. J. 225, Q. B.; *Eastern Counties Railway v. Hawkes*, 24 L. J. 601, Ch.

(*i*) *Haigh v. Guardians of North Brierley Union*, 28 L. J. 62, Q. B.; *Haddon v. Ayers*, 28 L. J. 105, Q. B.

This question was touched but not decided in a late case (*h*). There the action was against the defendants as carriers, not saying as common carriers, for a delay in the delivery of cattle which had been received on a truck of a heavy goods train of the defendants. On the transit the railway became seriously obstructed by a heavy fall of snow; and the engine of the goods train was detached from it, in spite of the remonstrance of the plaintiff, to assist a passenger train. The case was treated as an ordinary one against a special carrier for hire, and the jury accordingly were only asked whether the delay arose from the negligence of the defendants or from inevitable accident; and a verdict was found for the defendants, which the court upheld on the principle, that the defendants were not bound to make extraordinary exertions to forward the cattle, although they were bound to do so in order to forward passengers who paid a higher tariff. Here no question arose as to the effect of a contract of insurance, which would have had to be considered if the defendants had been sued as common carriers; and the case was also only one of delay, and not of absolute loss or nonperformance. It therefore ranges itself under the principles which have been already considered under the question of a common carrier's liability for delay (*l*).

It is quite clear that nothing is, in a legal sense, the act of God, unless it be a manifest deviation from the usual course of nature. Earthquakes, tempests and thunderstorms are sufficiently rare to deserve the name of unusual and imprevisible events; they are, therefore, in legal language, acts of God. Accidental fires, unsafe roads, dangerous bridges, and severe storms of wind and rain, are comparatively frequent human casualties. The

(*h*) *Briddon v. Great Northern Railway Company*, 28 L. J. 51, Exch.

(*l*) *Supra*, pp. 51—53; cf. *Pole v. Cetcovitch*, 3 L. T. Rep. 438, and *Sjordet v. Hall*, 4 Bing. 607, and *infra*.

losses by them are in all cases caused, to a certain extent, by human carelessness, or by misfortune which is practically the same thing as carelessness; and therefore, in a legal sense, they are not acts of God. But it is difficult to distinguish in all cases between what the law deems the act of God, and that which it holds to be the act of man. For instance, it is stated that a common carrier is not liable for loss or damage by tempest; and yet it is clear that he is liable if goods be damaged during their transit by ordinary wind or rain. A case might, therefore, easily arise, in which it might be an important question whether a storm was a tempest, or merely a severe shower; and such a point would clearly be for a jury. If they found it a tempest, the carrier would claim his immunity as from the act of God; if it were pronounced a shower, or less than a tempest, his liability as an insurer would arise.

So, also, where the accident is traceable to ignorance of ordinary laws of physical cause and effect, such an accident cannot be treated as the act of God. Thus, where the captain of a steam vessel, in the month of February, intending to sail the following morning, pumped water into the boiler of the engine on the previous night; and the action of the frost caused the pipe, which was previously sound, to burst; by reason of which the water escaped into the hold and damaged the cargo; the owner was held liable for negligence as a carrier, because "it is well known that frost will rend iron; and, if so, the master of a vessel cannot be justified in keeping water within his boiler in the middle of winter, when frost may be expected" (*m*).

Whatever may be the precise point at which a common carrier will be relieved from his responsibility as an insurer on the plea that the loss was caused by the act of God, it is plain he will not be relieved from this liability, unless the

(*m*) Best, C. J., *Siordet v. Hall*, 4 Bing. 607; cf. *supra*, p. 76.

accident can be traced to some extraordinary interruption in the ordinary course of nature. It will not be sufficient to trace it to a mere inevitable physical necessity, if that necessity could have been reasonably anticipated. "There is a nicety of distinction between the act of God and inevitable necessity" (*n*). And many cases have been collected by Mr. Justice Story, in his treatise on Bailments (*o*), which illustrate the analogous and supplementary doctrine, that a carrier by sea at common law, 'without the usual exception against "the perils of the sea," in a charter-party, is not liable for such accidents as are traceable to irresistible and inevitable necessity.

It would be foreign to the subject of the present work to investigate this doctrine minutely; and it will be studied more conveniently in works on maritime carriage. But it may be remarked, that if the "act of God" and "the perils of the sea" are to be regarded as being synonymous, according to the apparent opinion of Mr. Justice Story, it is more difficult to distinguish the "act of God" from "inevitable necessity," in the case of sea carriage than in the case of land carriage. A greater latitude of signification appears to be attached to the phrase in the case of sea carriage where loss arises from shipwreck, or from the stranding of vessels. If the accident can be traced to the culpable ignorance or carelessness of the master, he will be liable for loss or damage; as if the ship strike on a rock which is marked in the chart; or the existence of which was known by pilots or other competent men. "On the other hand, if a ship is forced upon such a rock or shallow by adverse winds or tempests; or if the shallow is occasioned by a sudden and recent collection of sand, where ships before could sail with safety; or if the rock or shallow is not generally known; in all these cases the loss is to be attributed to the act of God, and it is deemed a peril of

(*n*) Lord Mansfield, in *Forward v. Pittard*, 1 T. R. 33. (*o*)-Sects. 512, 524.

the sea." (*p*). Thus, if a ship be properly moored and be injured by a reflux of the tide (*q*); or by the washing away of a bank, or other natural safeguard (*r*); or is forced by stress of weather to enter a port and there becomes injured by the ebb and flow of the tide (*s*); the carrier will not be liable for consequent damage. But a land carrier would clearly be liable for damage arising from the fall of a cliff, or the breaking of a watercourse; for such accidents, although rare and to some extent inevitable, are casualties which might be prevented by a perfect system of political organization, and which cannot therefore be included in the catalogue of irregular and inevitable accidents which the law terms acts of God. But the element of water is less under human control than the element of land; and it appears to be on this principle that the law does not include the "moving accidents by flood and field" in one identical category: but attributes the same casualty in the one case to inevitable necessity, or the act of God; and in the other case to inevitable misfortune, or the act of man.

But where the defendants, as common carriers, undertook to convey the plaintiff's goods from Gosport to Ryde in a boat which was to be towed by the steamer of the defendants; and the boat, partly owing to the proper exertions of the captain of the steamer to keep clear of another vessel, and partly owing to the boisterous weather and high sea, fouled with the rudder of the steamer; in consequence of which the boat sprang a leak, and the goods were damaged; the defendants were held to be liable as insurers, because there was nothing unusual in the weather, and because the accident was caused proximately

(*p*) Story on Bailments, s. 516.

(*q*) *Fletcher v. Inglis*, 2 B. & Ald. 315.

(*r*) *Smith v. Shepherd*, Abbott on Shipping, ch. 4.

(*s*) *Corcoram v. Gurney*, 22 L. J.

113, Q. B.; and Abbott on Shipping, ch. 4; *s. v. Thompson v. North*

Eastern Railway, 3 L. T. Rep. 618.

by the steamer stopping to keep clear of the other vessel. The court held that the damage was caused by the act of man, and that it would be an abuse of language to call it the act of God (*t*).

The next common law exception to a common carrier's unlimited liability arises when the loss or damage is caused by the king's enemies. This term is strictly confined to the inhabitants of a country with which the English nation is at war; and does not include highway, or other robbers or thieves; but it is considered to comprise pirates, because it is said they are universally treated as the enemies of all mankind (*u*). In a case in the Exchequer Chamber it was held, that a robbery by a crew, who murdered their captain, was an act of piracy within the meaning of a policy of insurance against piracy (*x*).

Losses by robbery on the highway, or by the depredations and violence of mobs, rioters (*y*), and felons, are not losses by the act of the king's enemies within the meaning of the exception (*z*). Even where a carrier receives goods for carriage, with a special agreement that he shall not be liable for loss or damage by pirates, or the dangers of the sea or roads; he will still be liable if they are stolen or lost during the transit. Thus, in a late case, the plaintiffs had consigned goods to the defendants to be carried from Panama to London, and there delivered. In the bill of lading, it was expressed that the defendants were to deliver safely, "the act of God, the Queen's enemies, pirates, *robbers*, fire, accidents from machinery, boilers and steam, the *dangers of the seas, roads* and rivers, of whatever kind or nature soever, excepted." The goods arrived safely at Southampton, and were secretly stolen, owing to the negligence of the defendants,

(*t*) *Oakley v. Portsmouth and Ryde United Steam Packet Company*, 11 Exch. 618; 25 L. J. 99, Exch.

(*u*) Story on Bailments, s. 526, and cases cited there.

(*x*) *Palmer v. Naylor and others*, 8 Exch. 739; 23 L. J. 327, Exch.

(*y*) *Edwards v. Sherratt*, 1 East, 604.

(*z*) Story on Bailments, s. 526.

while on their transit by railway to London. The defendants were held liable, because the term "robbers," although occasionally synonymous with "thieves," clearly meant in this instance "robbery by violence." Parke, B., in delivering the judgment of the court, said: "The nature of the transaction shows clearly that the word 'robbers' means not 'thieves,' but robbers by force, to whom the term is more reasonably applied; though, in common parlance, it is often applied to every description of theft. We have no doubt, therefore, that in the bill of lading this is the proper meaning of the word 'robbers;' and this being so, the loss in this case was not by robbers: and that plea, in which the loss is so stated, ought to be found for the plaintiffs. We do not feel any difficulty as to the meaning of the term 'dangers of roads.' We think the word 'roads' either explained by the contract to mean marine roads, in which vessels lie at anchor; or, supposing it to mean roads on land, the dangers of roads are those which are immediately caused by roads, as the overturning of carriages in rough and precipitous places. Losses by robbery are already provided for under the general term robbers; and the same reason which induces us to believe that the parties did not mean that the defendants should be exempted from pilfering by thieves, when loss by robbers is exempted, leads us to the conclusion that they did not intend that they should be protected in the case of loss by thieves in passing along roads (*a*). On similar principles it is held, that even where a carrier declares under the Carriers' Act that he will not be liable for the loss or injury of goods above the value of 10*l.*, such a declaration will be a defence only where the goods are bodily abstracted, or otherwise lost from the personal possession of the carrier; and it appears that he may still be liable for a loss not falling within this definition; such as damage arising from a detention or delay in delivering the goods (*b*).

(*a*) *De Rothschild v. Royal Mail Steam Packet Company*, 7 Exch. 734.

(*b*) *Hearn v. London and South-Western Railway*, 24 L. J. 180, Exch.

The third case in which a carrier is, at common law, freed from liability for loss or damage, is where the consignor has caused it by his own fraudulent conduct towards the carrier. Even in ordinary cases fraud, or concealment of material facts on the part of an insuring party, at the time when an insurance is underwritten or granted, will vitiate and avoid the policy. Thus, also, it is a principle at common law, that if a consignor be guilty of fraud or unfair concealment of material facts in his transactions with a common carrier; the existence of such fraud or unfair concealment may be pleaded as a defence, and left as a material question to the jury; and, if found as a fact by them, it will completely exonerate the carrier.

But the cases, in which carriers pleaded the consignor's fraud, or concealment of material facts, as a defence and a justification against loss or damage, were generally cases in which the consignor, wishing to escape additional charge for costly goods, intrusted them to the common carrier without any notification of their value; and then sought to make him liable, in the event of loss or damage, for the full amount. Such a liability clearly attached to a common carrier at common law; but its hardship and injustice soon became apparent: and the operation of the principle was found to sacrifice the just rights of the carrier to the wilful or fraudulent carelessness of the consignor. This portion of a carrier's duty and liabilities is now generally and principally regulated by the Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 68, which will be considered in detail in a following chapter; but there are still cases which do not range within it; and it is therefore desirable in this place to state the common law doctrine on the subject.

In *Gibbon v. Paynton* (c), Lord Mansfield said: "If the owner of the goods has been guilty of a fraud upon the carrier, such fraud ought to excuse the carrier;" and in the same case Yates, J., said, that a carrier "ought not to be answerable where he is deceived." These principles,

(c) 4 Burr. 2298.

it is apprehended, remain unqualified and unaffected by the current of subsequent cases; and the decisions and the statute will be found only to have excluded from the category of fraudulent cases, some which, at common law, were held to be comprised within it. Those cases are, it is believed, without exception, cases in which the consignor has concealed the value of goods from the carrier at the time of delivery, with the object of preventing the latter from demanding an increased charge, in consideration of the increased risk. It has been the object of the courts and of the legislature, during the last hundred years, to relieve the carrier from unreasonable liabilities in this respect. Until *Gibbon v. Paynton* was decided, it appears to have been held, that the mere fact of intrusting valuable property to a carrier without communicating its nature and value, was insufficient evidence of fraud to support a verdict for the carrier. But the above case established the principle, that if a carrier expressly gave notice that he would not be liable for valuable goods unless they were intrusted to him as such; and if, with a knowledge of this notice, a man consigned valuable goods to the carrier without informing him of their nature; these facts are sufficient evidence of an intention on the part of the consignor to deceive the carrier, to support a verdict for the latter.

But when a carrier relied on a public notice to relieve him from liability, it was necessary for him to show that it had come to the knowledge of the consignor at the time when the goods were delivered to be carried; and it was not enough for him to show merely that he had published or extensively advertised such notice. On the fact of such publication and advertisement a jury might, indeed, if they thought proper, find that the consignor had been affected with notice; and then, on this ground, proceed to find that he had been guilty of a fraudulent concealment towards the carrier. And in *Kerr v. Willan (d)*, Lord Ellenborough ap-

pears to have thought that "an advertisement in a public paper might be sufficient presumptive evidence of notice;" but this case, although not mentioned in *Rowley v. Horne* (*e*), was clearly overruled by it: for it was there held, that it was not sufficient to fix a sender with knowledge of a notice, to show merely that a carrier had for three years regularly advertised it in a paper which the sender was proved to have taken in regularly during that period; and the court held "that it could not be intended that a party read all the contents of any newspaper he might chance to take in; that carriers, who wished to divest themselves of their common law liability, were bound to fix upon their employers a knowledge of such notice; and that they might easily do so by delivering to every person, who brought a parcel for conveyance, a printed paper containing the notice (*f*).

Still it became to be treated as an established principle, that where a carrier expressly limited his liability by notice, and it was sought, notwithstanding, to hold him liable for the loss or damage of valuable goods; a jury might always be asked, whether the circumstances of the case induced them to believe that the consignor had acted fraudulently or unfairly towards the consignee in not communicating the value of the property; and if they thought so, it amounted virtually to a verdict for the defendant; unless they also considered that, notwithstanding the concealment, the goods had been lost or damaged by the gross negligence of the carrier (*g*). It was held, also, very shortly after, that if the carrier deviated, however slightly, from the terms of his contract with the consignor, as by sending the goods under circumstances of increased risk by another conveyance; he would not be protected by his notice, nor by the consignor's wilful concealment of value (*h*).

These principles are clearly recognized in many nearly

(*e*) 3 Bing. 2.

(*g*) *Batson v. Donovan*, 4 B. &

(*f*) See also *Bodenham v. Bennett*, 4 Price, 31.

Ad. 21.

(*h*) *Sleat v. Fagg*, 5 B. & Ald. 342.

contemporaneous cases (*i*). It was also established that, even where a consignor wilfully disregarded the notice of the carrier, the latter was still bound to take reasonable care of the goods, and would be liable for gross negligence (*k*). But it was left unsettled how far the consignor, in the absence of demand of notice, was bound to communicate the nature of valuable goods to the carrier; and Best, C. J., in the two last-named cases, distinctly denied that the consignor was bound by any such duty. But it was also stated by the same learned Judge, not long after, that "a carrier has a right to know the value and quality of what he is required to carry." If the owner of the goods will not tell him what the goods are, and what they are worth, the carrier may refuse to take charge of them; but if he does take charge of them, he waives his right to know their contents and value" (*l*).

It is difficult to state how far this doctrine is to be considered law. It must clearly be limited; and there is even weighty authority for treating it as altogether untenable. It is evidently erroneous in its universality; but it is still undecided whether there are not cases to which it may apply. It is now settled as a general proposition, that a carrier can *not* refuse to carry merely because a consignor refuses to state the contents of a package. This was decided in the case of *Crouch v. London and North-Western Railway* (*m*).

There the plaintiff delivered to the defendants, who were common carriers, a package containing several smaller parcels. The action was for not carrying; and one of the pleas raised for the defence was, that, when the goods were tendered to the defendants, they requested the plaintiff to inform them of the contents, with which request he refused to comply. The court held the plea bad. Jervis, C. J.,

(*i*) *Mayhew v. Eames*, 3 B. & C. 601; *Marsh v. Horne*, 5 B. & C. 322; *Brooke v. Pickwick*, 4 Bing. 218; *Machlin v. Waterhouse*, 5 Bing. 212.

(*k*) *Batson v. Donovan*, *supra*; and *Brooke v. Pickwick*, 4 Bing. 218; see

Hinton v. Dibbin, 2 Q. B. 646, in cases under the Carriers' Act.

(*l*) *Riley v. Horne*, 5 Bing. 222.

(*m*) 14 C. B. 255; 23 L. J. 73, C. P.; cf. *Finnie v. Glasgow, &c. Company*, 2 Macq. H. of L. Cases, 177.

said: "No authority has been cited to show that a carrier is entitled *in every case* to know the nature and quality of the goods tendered to him to be carried . . . but even if it be reasonable, *under certain circumstances*, that he should be informed of the contents of a parcel, the plea should have stated that there was a reason on this occasion requiring the information. It is not alleged in the plea that there was a reason. The plea is founded on a general proposition that, in the case of all goods, of whatsoever nature or quality, sent to a common carrier, the person delivering them is bound to know and to be able to state, if required, their nature and quality. Now, I think, if that be so, the consequence would be so highly inconvenient that we should require authority to support it."

Maule, J., said: "In order to sustain this plea, we must hold that, in all cases whatever, the carrier has a right to ask the person who brings the parcel what the contents are; and, if he is not informed, that he may refuse to carry it. There is no authority to support that. There are *dicta* of Best, C. J.; but I conceive there is nothing amounting to an authority on the subject; and it is a proposition which is untenable in its generality or rather universality, seeing the extent to which it would lead if this plea were a good one. In order to make it a good one, it ought to have alleged some ground why the defendants made that inquiry. If they do not suggest any, it must be considered that there is no special ground. Now, there is no doubt that if there is any deception or any improper package sent by the plaintiff, the defendants are not liable for a damage arising to it; but if there is any deception as to the value, the defendants are not liable. As to that, the defendants are competent to limit, and they do limit by their notice, their liability with respect to certain valuable commodities; and with respect to dangerous articles, there is provision made that they may examine the parcel if they think fit; and whenever there is a good reason to suspect the contents, they may either insist on being informed of the nature of them, or, if the information is

refused, they may say, 'then we must open it ourselves;' or, 'we will not take it;' but it cannot be maintained that in all cases the carrier may require the person to give him a full description of every article in it" (*n*).

It is to be observed, that this case involved no consideration of the Carriers' Act, but only of the common law duties of carriers, as regulated in the case of railways by the Railways Consolidation Act, 8 & 9 Vict. c. 20. By the 89th section of that act, railways electing to act as common carriers have co-extensive liabilities and rights; but by the 105th section a penalty is imposed on any one tendering dangerous goods, such as vitriol, gunpowder, lucifer matches, &c., to be carried, without notice to the company; and railway companies are empowered "to refuse to take any parcel that they may suspect to contain goods of a dangerous nature, or require the same to be opened to ascertain the fact." No point was made in the above case that any such suspicion existed; and the question, therefore, was treated as an abstract inquiry into the common law right of a common carrier, to know the contents of a parcel tendered to him. It can hardly be said that the result is satisfactory; for while, on the one hand, it is clear from the language of the court, that a carrier has no universal nor general right to know the contents of a parcel; yet it seems also admitted that there may be, and are, cases in which such a right exists. The Chief Justice appears to have thought that there may be circumstances under which a carrier has a common law right to know the contents of a parcel before he is bound to receive it; but Mr. Justice Maule seems to have inclined to the opinion, that if an improper parcel be tendered to a carrier, or if he receive it under circumstances of deception; he cannot refuse to carry it because the consignor refuses to disclose the contents, but he will not be liable for damage arising to it.

(*n*) See also *Crouch v. Great Northern Railway*, 9 Exch. 556; 23 L. J. 148, Exch.

It must, therefore, be considered to be still unsettled how far a carrier can legally refuse to carry goods, on the ground that the consignor refuses to disclose the contents. It is true that, under the Carriers' Act, the carrier can protect himself from liability, loss, or damage, where the goods are of any of the kinds specified in the act, and above the value of 10*l*. But where the goods are not of such description, or under the value of 10*l*., the carrier's right to be informed of the contents of a parcel appears to be very doubtful. All that can be said with reasonable certainty is, that there are some undefined cases in which such a right may exist; but that generally it has no existence. It seems, however, reasonable and probable that, notwithstanding the 4th section of the Carriers' Act, which prevents a carrier from limiting his liability by notice; a carrier refusing to carry dangerous goods, such as those specified in the above section of the Railways Consolidation Act, or other goods of a peculiarly perishable nature, would be held to have a good defence at common law; and if they were delivered to him without notice of their dangerous or perishable nature, the withholding of such notice would be evidence for a jury, in the event of loss, of an intention to deceive the carrier.

It must be carefully borne in mind that these remarks apply only to cases which are not within the Carriers' Act. If the goods tendered to the carrier belong to any of the classes which are mentioned in the first section; and, if the carrier have duly limited his liability by a public notice according to the act; the carrier will be entitled to know the character and value of the contents before he can be required to carry the goods. When he has obtained this knowledge, he may refuse to carry until he has been paid the full price of carriage, as calculated according to the value of the goods. But, even in this case, he has no absolute right to know the contents of a package, nor to refuse to carry because the consignor refuses to disclose them. He may obtain information *aliunde*, and then refuse

to carry unless full particulars are given by the consignor, sufficient to enable the carrier to calculate the amount of increased hire which he is entitled to demand beforehand ; but he will act thus, probably, at the risk of an action for refusing to carry if it should appear that he has been misinformed, and that the goods are not within the statute. The prudent course in the majority of cases will be, to be satisfied with the statutory exemption from liability which he has generally, when valuable property above 10*l.* is intrusted to him without notification of its value. Thus, when carriers gave notice that they would not be liable for "maps in packages," unless insured and paid for according to their value ; the defendants were held not liable, because the plaintiff had not in the first instance disclosed the contents and paid for them accordingly ; and it was held, in this case, that the carrier might have refused altogether to carry, unless his increased charge were paid beforehand (*o*).

It will now be sufficiently apparent that a mere concealment of the contents of a package ; or even the distinct refusal to reveal their nature, will not be enough to support a carrier's plea of fraud against a consignor. Such concealment will in certain cases, under the statute, relieve the carrier from liability for loss or damage, at least unless it be caused by his gross negligence (*p*) ; but, alone, it is no evidence of fraud. But if there be more than a bare concealment ; if there be any sort of misrepresentation or other attempt on the part of the consignor to mislead the carrier, such conduct will be evidence to support a plea of fraud. It has been said by Parke, B. : "I take it now to be perfectly well understood, according to the majority of opinions upon the subject, that if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as are necessary ; if he ask no questions, and there be no fraud to give the case

(*o*) Parke, B., Wyld *v.* Pickford,
8 M. & W. 443.

(*p*) Wyld *v.* Pickford, *supra*.

a false complexion on the delivery of the parcel, he is bound to carry the parcel as it is. It is the duty of the person who receives it to ask questions; if they are answered improperly, so as to deceive him, then there is no contract between the parties; it is a fraud which vitiates the contract altogether" (q). In *Walker v. Jackson*, the defendants, as proprietors of a ferry, had given public notice, by a placard, that they would not in anywise be responsible for any loss or damage to carriages while being landed; but there was no evidence that the plaintiff knew of the notice. The defendants conveyed his carriage, containing jewellery and watches, across the ferry; and some of these were damaged while they were being landed by the defendants. It was held, that their implied contract to carry safely was not waived or affected in any way by the fact of the plaintiff having said nothing about his property or its value; and that as there was no evidence of a special contract, they were liable for negligence as carriers for hire.

(q) *Walker v. Jackson*, 10 M. & W. 168.

CHAPTER VII.

ON THE DUTIES OF CARRIERS, AS REGULATED BY SPECIAL CONTRACT, AND BY THE CARRIERS' ACT (1 WILL. 4, C. 68).

IN the preceding chapters the duties and liabilities of carriers have been regarded from a common law point of view. In the present chapter they will be considered as subject to the limitations of special contracts between the carrier and his employer; or as modified by an important and principal statute.

Special contracts, between a carrier and an employer, form a kind of connecting link between the common law and statutory liabilities of carriers. Their gradual superstructure, on the simple basis of a common carrier's duties, by removing, or lessening his liability as an insurer, became first, the means of converting him into an ordinary bailee for hire; and then, by creating endless misunderstandings between him and his employer, as to the subsisting extent of his liability, rendered it necessary for the legislature to interfere, and provide an authoritative solution for the most pressing perplexities of the courts. Thus, until the Carriers' Act became law, it was scarcely satisfactorily settled that even the deliberate act of sending goods by a carrier, with a full knowledge that his liability was restricted to a certain amount, raised a binding obligation in the sender not to require more than that amount in the event of damage. The Carriers' Act settled a long pending controversy, by defining the cases and the conditions under which a carrier might limit his liability by a public notice; but it left the still more unsettled question of special contracts unaffected by its provisions; and the result has been

a large amount of litigation on the construction of special contracts between a carrier and his employer, and the rules by which such contracts are to be interpreted. The 17 & 18 Vict. c. 31, has, to a certain extent, elucidated this difficulty in the cases of railways and canals; but, by so doing, and by omitting to make its provisions applicable to all regular carriers for hire, it has only created a distinction of classes, and declared that to be law, when the carriage is by railway or canal, which is not law when the carriage is by coach, waggon or cart, or on a navigable river. A transitional state of law is intelligible only when it is treated to some extent historically; and a development of some doctrines, which have been already noticed, will conduce to a clear comprehension of this portion of the subject.

A special carrier for hire, who was no more than a mere bailee for hire, had always, and still has, an unlimited power of restricting his liability by the terms of an express contract with his employer, before receiving goods to be carried. In this way he might free himself from any, or all, of the duties and liabilities which, in the absence of such a contract, attach to him at common law.

Similarly, common carriers have freed themselves, step by step, from their liabilities as insurers, and have placed themselves in the position of special carriers for hire. In fact, when a common carrier has relieved himself by express contract from his responsibility as an insurer, he becomes at once converted into a special carrier for hire, liable only for gross or culpable negligence (*a*), and not even for that, if he have contracted explicitly that he will not be liable for any kind of negligence (*b*). In both

(*a*) *Riley v. Horne*, 5 Bing. 220; *Sleat v. Fagg*, 5 B. & Ald. 342; *Wright v. Snell*, ib. 350; *Birkett v. Willan*, 2 B. & Ald. 356; *Beech v. Evans*, 16 East, 244; *White v. Great Western Railway Company*, 2 C. B., N. S. 7; 26 L. J. 158, C. P.; *M'Ma-*

nus v. Lancashire and Yorkshire Railway, 28 L. J. 353, Exch.

(*b*) *Carr v. Lancashire and Yorkshire Railway*, 7 Exch. 712; and *infra*, s. v. next case; *Hearn v. London and South-Western Railway*, 24 L. J. 180, Exch.

cases, whether the carrier is still to be called a common carrier or a special carrier for hire, the duties and rights become co-extensive, and he is required only to take reasonable care of the goods up to the time of delivery; but the mere fact that such carriers do not insure, nor warrant the safe delivery of the goods, will not exonerate them from liability for gross or culpable negligence. Even when carriers are exempt from liability for goods above the value of 10*l.*, under the Carriers' Act, they must still employ reasonable care. Thus where the plaintiff sued for the value of a portmanteau, which he had lost during his journey in the railway train of the defendants; and the latter relied upon the statutory exemption: Jervis, C. J., said:—"The company received the plaintiff's portmanteau to be carried safely, although they did not warrant. The act of parliament would not justify them in throwing it overboard. There may still be a duty imposed on them to carry safely, notwithstanding they are not insurers" (*c*).

This confusion, or identification of the two principal classes of carriers, has been caused by the operation of the principle that two contracting parties may introduce, into an implied or express contract, any conditions which are not illegal; and it must be admitted, that the theory of voluntary contracts would be violated, if it were to be held that a man is not to be bound by terms which he has accepted deliberately. Accordingly, it is said that "the right of making such qualified acceptances by common carriers seems to have been asserted in early times. Lord Coke declares it in a note to Southcote's case (*d*), and it was admitted in *Morse v. Slue* (*e*). It is now fully recognized and settled beyond any reasonable doubt, in England" (*f*). But it is clear, on principles already stated, that a com-

(*c*) *Marshall v. York and Newcastle and Berwick Railway*, 11 C. B. 665, n.

(*d*) 4 Rep. 84.

(*e*) 1 Vent. 238.

(*f*) Story on Bailments, s. 549,

approved by Cresswell, J., in *Austin v. Manchester, &c. Railway*, 10 C. B. 473; *Nicholson v. Willan*, 5 East, 513; *M'Andrew v. Electric Telegraph Company*, 25 L. J. 26, C. P.

mon carrier cannot force a special contract on his employer; and that if the latter refuse to grant a limited liability, the carrier is bound to carry, on terms of unlimited liability, such goods as he is in the habit of carrying for the public, and for the carriage of which the employer tenders him reasonable hire. Thus, in *Carr v. Lancashire and Yorkshire Railway* (*g*), where the defendants relied upon a special contract to protect them against loss by gross negligence, Parke, B., said: "If the plaintiff had meant to make the defendants liable as common carriers, the course for him to take was to tender them the price for the carriage of the goods; and, on their refusal to carry, to bring an action against them for not carrying. . . . The duty of a carrier binds him to carry those goods only which, according to his public profession, he is bound to do. That is established by *Johnson v. The Midland Railway* (*h*). But with the defendants in that character we have nothing to do, because this was the case of a special contract; and we have nothing to do but to inquire into the meaning of it."

Subject to these limitations, a common carrier may always be required to carry on the terms of his common law liability; and an action will lie against him for refusal (*i*). But if the sender waives his right, and enters into a special contract with the carrier, the only question will be, after the fact of the special contract has been proved, as to its terms and their construction. As these are now in many cases subject to the provisions of the Carriers' Act, we have arrived at the point where this statute may be fitly considered.

THE CARRIERS' ACT (1 WILL. 4, C. 68) (*k*).

It has been already stated (*l*) that, prior to this Act, great difficulty had been experienced in fixing a sender of

(*g*) 7 Exch. 707; 21 L. J. 263, Exch.

(*h*) 4 Exch. 367.

(*i*) *Supra*, p. 33.

(*k*) See the whole Act in the Appendix.

(*l*) *Supra*, p. 84.

goods with such a knowledge of the public notices by which carriers had long attempted to limit their liability, as would justify a jury, or a court, in implying an assent, on the part of the sender, to a special contract between him and the carrier, according to the terms of the notice. It was found that at one time the carrier was the sufferer by being held responsible for valuable property which had been intrusted to him without any accompanying communication of its nature; at another time, that an innocent sender was constructively fixed with a knowledge of a notice about which he had known really nothing. It was necessary to bring home a knowledge of the notice to him before he could be affected by it; but as soon as this was done; or, more frequently, as soon as a faint presumption of such knowledge could be attributed to the sender; the jury was directed to find that a special contract existed between him and the carrier. To adjust the disturbed balance of natural equity in these respects, the Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 68, was passed. It declares substantially, in the 1st section, that no common carrier *by land* (*m*), for hire, shall be liable for the loss of, or injury to, various specified kinds of valuable property, when the value of such property shall *exceed the value of 10l.*, unless, at the time of the delivery to the carrier or his agent, the *value and nature* of such property shall have been declared by the sender, and an increased charge paid, or agreed to be paid.

The 2nd section permits carriers, in anticipation of parcels of the above value, to affix a notice, in legible characters, to some conspicuous part of their booking or receiving offices, stating the increased rate of charge required to be paid over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and it is declared, that the senders of such valuable parcels shall be held bound by such notice,

(*m*) *Pianciani v. London and South-Western Railway*, 18 C. B. 226.

without further proof of the same having come to their knowledge.

The 3rd section requires a carrier, after the value of such parcels has been declared, and the increased rate paid, or agreed to be paid, to sign a receipt, if required, for the parcel and the insurance; and if either the receipt be not given when required, or the statutory notice not duly affixed, the carrier is to remain liable as at common law, and also to refund the increased rate or charge.

The 4th section provides, that carriers are to remain liable, as before the act, for all parcels and other property, in respect whereof they may not be entitled to the benefit of the act; any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding.

The 5th section provides, that every office used by the carrier as a receiving house, shall be deemed to be such; and that any one of several carriers, who are partners or joint proprietors, may be sued separately.

The 6th section provides, that nothing in the act shall annul, or in anywise affect, any special contract between a common carrier and his employer.

The 7th section provides, that, where a parcel has been duly delivered and paid for as a valuable parcel under the act, the owner may recover the amount of a loss or damage, including the increased charges for value and insurance.

The 8th section provides, that, notwithstanding the act, the carrier shall not be exempt from liability for loss or damage caused by the felonious or tortious acts of his agent.

The 9th section provides, that the carrier shall only be liable for the amount of damage actually proved.

The 10th section enables carriers, in actions against them, to pay money into court as in ordinary actions.

The 11th section declares, that the act shall be public, and judicially noticed.

The object of this act was, briefly, to relieve a certain

class of common carriers, namely, *land* carriers, from a liability for the loss or damage of the valuable articles specified in it; provided that senders, affected with the statutory notice, did not choose to state their nature and value, and pay a proportionably increased charge as an insurance through the transit. If such notice be not given, or if the carrier do not give a proper receipt for the increased charge, or comply strictly with all the statutory requirements, his liability is to remain as at common law; and it is to remain so in all cases where the property is not above the value of 10*l.*; or where it does not come within some one of the classes of valuable property named in the act. Its result is, that where the carrier complies with the terms of the act, and the sender does not so comply, there is, notwithstanding, a statutory special contract created between the sender and the carrier, by which the latter is wholly exempted from liability to make good any loss or damage which the goods may sustain during the transit. But if the carrier fail to comply with the statute; or if the goods be not within the statute; or under the value of 10*l.*; he remains liable as at common law. If both sender and carrier comply with the statute, the payment of the increased charge replaces the carrier in his common law position as an insurer; and the sender recovers all his common law rights against him (*m*).

It is to be observed, that the sixth section of the act expressly provides, that "nothing in the act shall annul or in anywise affect any special contract" between the carrier and his employer; and therefore, as before the act, it is held competent to the parties to modify the terms of the carrier's duty and liabilities in any legal manner, and to any legal extent, which they may choose to adopt. The result has been, that carriers have seldom consented to carry, during late years, without having either required or induced the sender to sign, or otherwise accept, a special

(*m*) Cf. the judgment of Erle, J., in *M'Manus v. Lancashire and Yorkshire Railway*, Sc. Cam., 4 H. & N. 327; 28 L. J. 354, Exch.

contract, by which the undertaking and liability of the carrier are defined and limited at the will of the latter. The majority of the late cases on the law of carriers involve only questions as to the particular construction of the terms of such contracts ; but some general rules may be extracted from their specialities.

But it may first be observed that, although the sixth section of the act left special contracts unaffected by its provisions, the fourth section absolutely put an end to one description of contract, which, up to that time, had been the most common form of special contract. That section provides that, from and after the passing of the act, no public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit, or in anywise affect, the liability at common law of any common carrier, for or in respect of any articles or goods to be carried and conveyed by him ; but that all such common carriers shall be liable, as at common law, to answer for the loss or injury to any articles and goods in respect whereof they may not be entitled to the benefit of the act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding.

The effect of this section is, that a carrier can no longer, in any case, limit his liability as before the act (*n*), by showing that he has publicly notified or advertised his limitation of liability ; and that the sender, at the time of delivery, knew of such notice. "The fourth section puts an end to the imperfect and vexatious mode to which carriers had recourse of placing notices in their offices, and the knowledge of which it was often very difficult to bring home to individuals (*o*);" and it is, therefore, no longer competent to a jury to find that a special contract, according to the terms of the notice, exists between the

(*n*) *Mayhew v. Eames*, 3 B. & C. 601.

(*o*) *Coleridge, J., Walker v. York and North Midland Railway*, 2 Ell. & Bl. 750 ; 23 L. J. 73, Q. B.

parties, notwithstanding that it is found that the goods were sent with a knowledge of such notice. The act renders such a public notice wholly inoperative as the basis of a special contract (*p*).

Where the carrier has affixed the statutory notice, the sender will be bound by it, even though he have delivered the goods without any opportunity of seeing it. In *Baxendale v. Hart* (*q*), the plaintiff sent to the defendant's office to request him to call for goods; and the defendant accordingly sent and received them at the plaintiff's residence. No communication was made as to their nature or value; and no increased charge, according to the value, was paid or tendered by the plaintiff. They were lost during the transit; and Pollock, C. B., after taking the opinion of the Court of Exchequer, ruled that, as the package was not delivered at the defendant's office, the defendants could not claim the benefit of the statute. But it was held, on error, that this ruling was incorrect; and that the carrier, having complied with the statute, was exempt from liability. Patteson, J., in delivering the judgment of the court, said: "We think the fair meaning of the statute, and in accordance with the first object of the legislature, is, that all persons who send goods of the particular description exceeding 10*l.* in value (they being the persons who know whether they are such goods or not, and the package not being open and its contents unknown to the carrier), whenever they deliver them to the carrier, are bound to give information of the nature and value of the articles, whether they are delivered at the office of the carrier, at the sender's house, on the road, or anywhere else; and the rest of the clauses of the act follow after, with certain provisions as to what is *then* to be done. Then it is that the carrier is entitled to have and to demand a larger charge, which is in the nature of a premium

(*p*) Coleridge, J., *Walker v. York and North Midland Railway Company*, 2 Ell. & Bl. 750.

(*q*) Sc. Cam. 6 Exch. 769; 21 L.J. 123, Exch.

for insurance: he cannot, indeed, have a larger charge (or if it be not paid, save himself from responsibility), merely by saying that he must have such and such a sum of money, varying in cases of different persons; but he must have a tariff or notice, stuck up in his office, of the sums which he means to charge above the usual charge for carriage for the different articles, to all the world who send articles of that kind. No doubt, therefore, it is made necessary by the second section that he should put a notice or tariff in his office; but then it must be observed that that notice assumes that the act of parliament has made it necessary for the sender to state the contents and the nature and value of the articles in the first instance; and the tariff is only to notify to persons what is the extra charge the carrier intends to make in such case. The real point is, who is to take the first step? We think that the act of parliament requires the person who sends the goods to take the first step, by giving that information to the carrier which he alone can give; and that if the sender does not take that first step, then he cannot maintain this action by the force of the first section of the act of parliament, which says expressly that the carrier shall not be liable unless the declaration is made. Such declaration, when made, will lead to other consequences: the carrier will know what he is to have according to the tariff which he has stuck up in his office: if that sum is paid and the goods are lost, then of course he would be liable; on the other hand, if he refuses to give a receipt, as provided by the statute, or has omitted to comply with any provision of that kind on his part to be performed, he would lose the protection given by the act; but in no case can the sender recover unless he has taken the first step, by giving the information which the legislature intended he should give, as we think, in the very first instance." On the other hand, when the sender declares the extra value, and no actual demand is made on him by the carrier for the increased charge, the carrier

remains liable as at common law. Thus, where the plaintiff called at the office of the defendants, where a statutory notice was duly affixed, and requested the defendants to send for a valuable painting, to be carried by the defendants from London to Newcastle; the defendants sent their van, and the man in charge of it received from the plaintiff the painting, and signed a receipt for it, in which it was declared to be of the value of 110*l.*; but the man in charge neither demanded, nor did the plaintiff tender, the increased charge: the defendants were held to be liable as insurers. The Judges relied on *Baxendale v. Hart*, and *Wilde, B.*, pointed out the usual steps in such cases and their consequences. "The sender must first declare the value of the parcel; then the carrier must demand the extra rate, which the sender either pays and is insured, or refuses to pay and insures himself; and then the carrier takes the parcel (*r*)."

In the argument on this case it had been suggested, that where goods are collected by van, the notice ought to be affixed to the van; but it was intimated by *Wilde, B.*, that this was unnecessary, in order to entitle the carrier to the benefit of the statute; although his Lordship suggested that it might be a prudent course for carriers to affix such a notice to their vans.

The above case and judgment are important as an illustration of the principles by which the Carriers' Act is interpreted. It has also been decided recently, that "the non-liability for 'loss of or injury to' goods, which a carrier may be entitled to claim under the statute, does not extend to cases where the plaintiff complains of a pecuniary 'loss,' arising from a detention of goods or delay in delivering them, but only to cases in which the article itself is either lost, or abstracted, or injured. The statute enacts, 'that no carrier shall be liable for the loss of, or any injury to, any of the enumerated articles.' This does not mean the loss of the moneys of the carrier, but the

(*r*) *Behrens v. Great Northern Railway*, 3 L. T. Rep., N. S. 863; 30 L. J. 153, Exch.

loss of the article itself, or injury to it. In ordinary parlance, this appears to mean the loss by the carrier of articles committed to him, or any injury to them whilst in his care; not the loss sustained by the owners by non-delivery of the article in due time or altogether, or the loss of the article by him. By the term 'injury' is commonly meant injury to the article itself. Then, although the use of the term 'loss' in the preamble does not aid the construction of the enactment, the recital of this clause does. It recites, that valuable property and articles of great value and small compass were liable to depredation, and the reason of the law must be considered as being to protect the carrier, not in all cases where the owner of the article suffers or sustains damage from the neglect of the carrier to carry; but in cases of a similar nature to those recited, where the chattel is either abstracted, or otherwise lost from the personal care, or from the place where it ought to be, and by reason of such loss is incapable of being delivered at the time that it ought to be. We think that this is the true construction of the clause; and the carrier is wholly exempted from being responsible for a loss by him of the particular article named, if there should be such a loss (s)."

There appears to be no doubt that, as before the statute, and according to the language of the court in *Clayton v. Hunt* (t), "the notice in the office ought to be in such large characters, that no person delivering goods there can fail to read it without gross negligence." But *Baxendale v. Hart* has apparently overruled the statement of the court in the former case, "that if a carrier's servant receives goods at a distance from the office, the special terms on which he deals ought to be communicated through some other medium." It is rather singular that this *dictum* and case do not appear to have been mentioned in *Baxendale v. Hart*; but it is clear, from that case, that the sender of goods

(s) Parke, B., in delivering the judgment of the court in *Hearn v. London and South-Western Railway*, 24 L. J. 180, Exch.; and *supra*, p. 82.
(t) 3 Camp. 27.

must, in the first instance, take cognizance of the notice, if duly affixed, at his peril. But such a notice will apparently be still unavailing, if it be placed in some inaccessible or remote part of the office where it is not likely to be seen by the public; or, if it be defaced, printed in small type, or otherwise illegible, or difficult to read (*u*).

The act applies only to *public* notices, and does not in any way affect the validity of a special contract, according to the terms of a notice which is *delivered* to the sender or his agent *personally*, before the carrier accepts the goods. The delivery of such a notice does not, it is said, *necessarily* create a contract between the parties; but it is evidence from which a jury may and ought to infer the existence of a contract according to the terms of the notice.

This doctrine was very fully considered in *Walker v. York and North Midland Railway Company* (*x*). There the defendants were common carriers, who had sent round notices to various fishmongers, that they would only carry fish on certain terms therein specified. Such a notice had been served on the plaintiff some time previously to his delivery of fish to the defendants; but after he had received it, he had expressly declared to the defendants that he did not hold it to be binding on him. Subsequently he sent fish to be carried by the defendants, which incurred damage, for which the defendants would have been liable at common law, but for which they contended that they were irresponsible on the express terms of the notice. Coleridge, J., left it to the jury to say, first, whether the notice had been served on the plaintiff; secondly, whether a special contract existed between the plaintiff and the company, that the fish should be carried on the terms stated in the notice; and he directed them that, if the plaintiff had been served with the notice, and afterwards sent the fish by the company's railway, they ought to infer an agreement on the plaintiff's part to the terms, unless there was shown an unambiguous refusal by the plaintiff to

(*u*) *Butler v. Hearne*, 2 Camp. 415.

(*x*) 2 Ell. & Bl. 750; cf. *infra*, p. 107.

be bound, and an acquiescence in that refusal on the part of the company. The jury found for the defendants, and the court discharged a rule which had been granted for a new trial on the ground of misdirection. Lord Campbell, C. J., said: "It is contended that, since the Carriers' Act, by giving notice in this case, there can be no special contract between the carrier and the owner of the goods. But I think the act has no such intention or operation. A carrier may still enter into a special contract for the carriage of goods; and what we are to consider here is, whether or not there is any special contract between the parties. The declaration alleges a common law liability. The second plea denies that the goods were received upon the terms alleged; and the third plea sets up a special contract. Then is there any evidence to show that the goods were not received, except upon the terms of the special contract set out? I think there is, because it appears, and the jury have found, that notice, limiting the liability of the defendants as carriers, was delivered to the plaintiff; and afterwards he delivered the goods to be carried by the defendants. I think that was evidence from which the jury were at liberty to infer a special contract, contrary to the common law liability of the defendants; and that the case was correctly left to the jury. The learned Judge did not tell the jury that of necessity the evidence showed a special contract. That would have been contrary to *Crouch v. London and North-Western Railway (y)*; but he left it to the jury to infer an agreement between the parties from the service of the notice, and the subsequent sending of the goods. I think that was properly left to the jury; and that they were justified in finding that, by sending the goods after he had been served with the notice, he had acquiesced, and that a special contract was thereby made between the plaintiff and the company; although I do not say the jury were bound in point of law to come to that conclusion." On the

general effect of the section, Wightman, J., said: "The section refers to public general notices which are stuck up in the offices of carriers, or otherwise publicly given; and not to notices served personally on individual dealers who are in the habit of sending goods by the carrier."

It is clear, therefore, from this case, that not only may special contracts, since the act, be made with common carriers as before the act, subject to the exception that such contracts cannot be implied from the sender's actual or constructive knowledge of a *public* notice; but that such contracts may be made by the carrier delivering to the person, from whom he receives the goods, a ticket, or written or printed notice, containing a statement of the terms on which he consents to carry; and that when this notice has been accepted by the sender there is, not necessarily a binding contract, but still evidence from which a jury ought to infer the existence of a contract in the terms of the notice (*z*). If an owner send goods after receiving such a notice, without distinctly repudiating it, he will be held to have acquiesced in its terms; and it would even seem that, even after such a repudiation of the notice, he will be held to have acquiesced in its terms, if he persist in sending the goods. If, therefore, he object to the terms, his proper course will be, after tendering the goods with sufficient hire to be carried on the terms of the common law, to withdraw the goods, and to sue the carrier for a breach of his public duty if the goods be such as he is bound to carry in the ordinary course of his business (*a*).

It was decided in *Walker v. North Midland Railway*, that a notice is not void, as a public notice under the fourth section of the Carriers' Act, merely because it is in the nature of a circular, provided a sender be proved to have received it; and it had been decided previously that a ticket, containing a printed limitation of the carrier's liability, if personally served, is not a public notice, but a

(*z*) Cf. the judgment of Erle, J., in *M'Manus v. Lancashire and York-* shire Railway, 28 L. J. 353, Exch.

(*a*) *Supra*, p. 95.

good notice within the act (*b*). In that case the action was for damage to a horse; and the defence a special notice of limited liability signed by the plaintiff. Coleridge, J., thus stated the substantial facts and law of the case: "The plaintiff comes with his horse to the station, pays for the carriage of it, and the clerk produces the ticket—whether the plaintiff signs it or not is immaterial—if he agrees to the terms set forth in it, he is bound by them." Erle, J., then stated the different modes in which such a special contract may be created: "Whether the plaintiff had signed the paper, or whether the clerk had mentioned the terms, or whether the latter had delivered to the plaintiff a ticket saying what the terms were, there would have been in each case good evidence of an agreement between the parties."

Accordingly, a simple delivery of the notice to the sender, at the time when the goods are accepted by the carrier, is sufficient to fix the former constructively with a knowledge of the contents of the notice, and consequently with the acceptance of a special contract, without any proof necessarily that the notice was read over, or its contents or purport explained to him (*c*). It has even been held by the Court of Common Pleas that, where it is clearly proved that the ticket or notice has been delivered to the sender by the carrier before he accepts the goods, a jury ought not to be told to consider whether the carrier received the goods as a common carrier, or under the special contract in the ticket; but that they should be told that there was either a special contract, or no contract at all (*d*).

It will be remarked that there is a fine shade of distinction, and an apparent conflict, between the view of the Court of Common Pleas and that of the Court of Queen's Bench on this question. The latter court, in *Walker v.*

(*b*) *Great Northern Railway v. Morville*, 21 L. J. 319, Q. B.

(*d*) *York, Newcastle and Berwick Railway v. Crisp*, 14 C. B. 527; 23

(*c*) *Slim v. Great Northern Railway*, 14 C. B. 647; 23 L. J. 166, C. P.

L. J. 125, C. P.; s. v. *supra*, p. 104.

York and Midland Railway, evidently held that, even when a sender is fixed with the personal acceptance of a notice of limited liability, it is still a question of evidence for a jury whether the acceptance of, or acquiescence in, its terms constitutes a special contract, such as will bind the sender. Lord Campbell there said distinctly that evidence of such a delivery did not *of necessity* show a special contract, but it was properly inferred from the sender's acquiescence in such notice; "although," his Lordship added, "I do not say that the jury were bound in point of law to come to that conclusion." On the other hand, in a substantially similar case, the Court of Common Pleas held, that, where goods are delivered to a carrier by a sender who has been previously served with a notice, these facts constituted, not merely presumptive, but conclusive, evidence of a special contract between the parties; and that the jury are not only "*justified*," as Lord Campbell stated, but *bound* to find that there was either a special contract of carriage, or no contract at all. The Queen's Bench therefore hold the existence of a special contract in such circumstances to be a question for a jury. The Common Pleas apparently hold it to be for the decision of a Judge; although, when an option is left to the jury of saying that there was no contract at all, it is virtually left to them to say whether there is a special contract. In this point of view the two last cases may be reconciled; and both may be held to agree that where there is *any* contract, in such a case it is a special contract; but the Court of Queen's Bench appears to hold the contract to be special on the finding of the jury; and the Court of Common Pleas to treat it as manifestly special, if there be any contract at all, on the terms of the notice (*e*).

In *Shaw v. York and North Midland Railway Company* (*f*) the defendants were charged, as owners and proprietors of a railway, with the breach of a contract to carry

(*e*) See also *Hughes v. Great Western Railway*, 14 C. B. 637; 23 L. J. 153, C. P. (*f*) 13 Q. B. 347; 18 L. J. 181, Q. B.

a horse of the plaintiff safely and securely. The defendants pleaded that they received the horse subject to a contract that they should not be responsible for any injury or damage, however caused, to the horse while travelling.

It appeared that the horse was killed during the transit, owing to a defect in the horse-box, which the plaintiff had pointed out to a servant of the defendants before delivering the horse, but in which he had acquiesced, on an assurance from the servant that the box was quite safe. The plaintiff then left the horse in the box, paid the clerk of the booking-office for the conveyance, and at the same time received a ticket with the following memorandum from him:—

“N.B.—This ticket is issued subject to the owner’s undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage (however caused) occurring to horses or carriages while travelling, or in loading or unloading.”

The court held it “to be clear that the terms contained in the ticket given to the plaintiff, at the time the horse was received, formed part of the contract for the carriage of the horse between the plaintiff and the defendants; and that the allegation in the declaration, that the defendants received the horse to be carried *safely and securely* by them, which would throw the risk of conveyance upon the defendants, is disproved by the memorandum; and the alleged duty of the defendants safely and securely to carry and convey the horse would not arise upon such a contract.”

In *Austin v. Manchester, Sheffield and Lincolnshire Railway (g)*, the facts were substantially the same; and a similar ticket, rather more comprehensive in its terms, was delivered to the sender and signed by him. The case turned chiefly on the sufficiency of the declaration, which did not clearly charge the defendants either as common carriers, or as carriers under a special contract. But it was held that, whether the plaintiff relied on an implied common

law contract or on a special contract, the liability of the defendants was wholly disproved by the express terms of the ticket.

Chippendale *v.* Lancashire and Yorkshire Railway Company (*h*) is a similar case, and still more extensive in its doctrine. There the plaintiff signed a receipt for his cattle, with a memorandum appended, similar to that which was delivered in Shaw *v.* York and North Midland Railway Company (*i*). The jury found substantially that the cattle were damaged during the transit by the *gross negligence* of the defendants; but the court held that the owner could not maintain an action, and that the defendants were fully protected by the notice. These cases, so far as they apply to railway and canal carriers, would now be subject to 17 & 18 Vict. c. 31, s. 7, by which such companies cannot rely on a special contract with the customer to limit their liability unless he have signed the contract.

Hence it appears that such notices as those which have been just cited, when accepted as special contracts, relieve the carrier from liability even for his gross or wilful negligence, provided, apparently, that it is not found to amount to actual fraud. Such is the manifest result of Carr *v.* Lancashire and Yorkshire Railway Company (*k*). There the ticket was like that in Shaw *v.* York and North Midland Railway (*l*); and the plaintiff's horse was found to have been damaged by the *gross negligence* of the defendants in managing their train. The court expressly noticed this fact; but held, notwithstanding, that the defendants were not liable, as the plaintiff must be held, on the terms of the notice, to have exonerated them even from the consequences of their gross negligence. Alderson, B., said: "The defendants in this case undertook to carry the goods in question on certain terms. The question then is, what are those terms? It is clear that they are such

(*h*) 15 Jur. 1106; 21 L. J. 22,
Q. B.

(*i*) *Supra*, p. 108.

(*k*) 7 Exch. 707; 21 L. J. 261,
Exch.

(*l*) *Supra*, p. 108.

as the defendants might lawfully make. It is plain to me that they undertook to carry the horse at the risk of the plaintiff. The words are, "the owners undertaking all risk of conveyance whatsoever." Now, under those terms, a question might be raised whether the injury contemplated was such as must issue in injury to the thing conveyed; so that a doubt might arise whether the case of the horse being stolen was contemplated, as, under such circumstances, the accident would not issue in damage to the horse. But that question would not arise here, as in this case the horse itself has been injured. The result is, that if there has been gross negligence on the part of the defendants, they are protected against liability by virtue of the words of the contract." In this view, as to the non-liability of the carrier, notwithstanding his gross negligence, Parke and Martin, BB., concurred. Platt, B., appears to have acquiesced, with a strong opinion, notwithstanding, that the carrier was liable. It is to be observed, also, that Alderson, B., appears to have thought that the carrier would not have been exempt if the horse had been stolen; or lost by any accident which did not "issue in damage to the horse (*m*)."

Where a carrier relies on a special contract, he must clearly prove it: and it will not be sufficient to show that a sender had a mere constructive knowledge of a public notice, authorized in a particular case, as where a railway company had power to make bye-laws (*n*). It appears to follow from this case that a sender, in the absence of a special contract, is not bound by any usage or practice of carriers at variance with their common law liabilities and duties: at least unless he delivers the goods with a knowledge of such usage or practice (*o*). In the last cited case, the common law duty of a carrier to deliver goods within a reasonable time was held to have been superseded by a special contract between him and the sender, by which it

(*m*) See next chapter.

197, C. P.

(*n*) Great Western Railway v. Goodman, 12 C. B. 313; 21 L. J.

(*o*) Hughes v. Great Western Railway Company, 23 L. J. 153, C. P.

was declared that the carrier was "not to be held responsible for the carriage or delivery within any certain or definite time."

To the same effect are *White v. Great Western Railway Company* (*p*), and *Phillips v. Edwards* (*q*).

So, where an Electric Telegraph Company expressly stipulated, that they would not undertake to transmit correctly messages which were not repeated back to the station from which they were sent: they were held to be free from liability as common carriers (*r*).

On the other hand, where a carrier has contracted expressly to deliver within a specified time, it will be no excuse that he was prevented from delivering by virtually uncontrollable circumstances. Thus, in *Great Northern Railway v. Hawcroft*, the passenger had taken an excursion ticket from A. to B., by which the railway company contracted expressly to return him to A. by any one of certain trains within fourteen days. The passenger presented himself duly at the station within the time, and claimed to be allowed to return by a certain one of the specified trains; but in consequence of a large influx of passengers, the company were unable, as they stated, from an insufficiency of carriages to take him. They refused to take him by an ordinary train, and kept him waiting until the next excursion train started. The railway company were held to be liable for the damage arising to the passenger from the detention (*s*). So, where a carrier advertises a vehicle to start at a particular time, and no such vehicle goes, he is liable to any one of the public for a breach of contract, and also in an action for false representation (*t*).

A carrier will be bound by any special terms to which

(*p*) 2 C. B., N. S. 7; 26 L. J. 158,
C. P.

L. J. 26, C. P.

(*q*) 21 L. J. 178, Q. B.

(*r*) 4 H. & N. 813; 28 L. J. 52,
Exch.

(*t*) *Denton v. Great Northern Rail-*
way, 5 El. & Bl. 860; 25 L. J. 129,

(*r*) *M'Andrew v. Electric Tele-*
graph Company, 17 C. B. 3; 25

Q. B.; cf. *Warlow v. Harrison*, 29
L. J. 14, Q. B.

he has assented in contracting with his employer. Thus, "where an order is given, previously to the delivery of goods, to a bailee, carrier or other person, to deal with them, when delivered in a particular manner, to which he assents; and afterwards the goods are accordingly delivered to him; a duty arises on his part, upon the receipt of the goods, to deal with them according to the order previously given and assented to; and the law infers an implied promise by him to perform such duty" (*u*). So, "if a person goes to the office of a carrier and asks what a thing will be done for; and he is told by a clerk or servant, who is transacting the business there, that it can be done for a certain sum, the master can charge no more" (*x*). In that case the plaintiff was told at the office by a clerk what the charge would be. The clerk exceeded his authority in stating the amount; but the master was held bound.

Where a special contract exists, and either party refuses to fulfil it, an action will lie for the breach before the expiration of the time within which it was to be fulfilled; and as soon as the contract has been formally repudiated in such a way as to exclude the presumption that the party repudiating it intended to reserve for himself a *locus pœnitentiæ* (*y*). But no action will lie if such a contract be unilateral. Thus, where a carrier agreed to carry all such goods as should be presented to him for that purpose by the defendants; and to perform all business for them in a prompt and expeditious manner at a fixed charge for twelve months; and it was mutually agreed that this contract should remain in force during that time; it was held, that this contract was unilateral; that it did not compel the defendants to present any goods to be carried; and that no action lay against the defendants for not presenting, nor for formally announcing, to the plaintiff that

(*u*) Per Park, J., in delivering the judgment of the court in *Streeter v. Horlock*, 7 Moore, 287.

(*x*) Lord Tenterden, in *Wingfield*

v. Parkington, 2 C. & P. 599.

(*y*) *Hochster v. Latour*, 2 E. & B. 678; *Cutter v. Powell*, 2 Smith's Lead. Cas. 1, and notes.

the arrangement was to cease from a day certain within the year (z).

In applying the law, which has been discussed in this chapter, to the cases of either railway or canal carriers, it must be remembered, that now no special contract with any such carriers is binding on any consignor of animals, or goods of any kind, unless the contract be signed by the consignor or the party delivering the goods to the carriers (17 & 18 Vict. c. 31, s. 7); and that such carriers cannot exempt themselves even by express contract from liability for the negligence of themselves or their servants, although in other respects they may make such conditions for receiving, forwarding, or delivering goods as a superior court of law, or a judge of such court, may think reasonable. This subject will be considered in a later chapter.

In concluding the consideration of the Carriers' Act, it may be convenient to append a complete and alphabetical list of the articles to which the act, solely and exclusively, applies :—

Bank-notes of the United Kingdom.
 Bills of exchange.
 China.
 Clocks.
 Coin—gold or silver of any country.
 Deeds, Title.
 Engravings.
 Furs.
 Glass.
 Gold—coin; manufactured or unmanufactured plate,
 or plated articles.
 Jewellery.
 Lace.
 Maps.
 Money—gold or silver, notes, bills, orders, securities
 for money.

(z) *Burton v. Great Northern Railway*, 9 Exch. 507.

Notes—of any bank in the United Kingdom.
 Orders for payment of money.
 Paintings.
 Pictures.
 Plate or plated articles, gold or silver.
 Precious stones.
 Promissory notes.
 Securities for payment of money.
 Silks—in a manufactured or unmanufactured state,
 and whether wrought up or not wrought up with
 other materials.
 Silver—coin and plate, or plated articles.
 Stamps.
 Stones (precious.)
 Time-pieces of any description.
 Title-deeds.
 Trinkets.
 Watches.
 Writings.

The act applies exclusively to the above articles, and to them only when the value of the article, or of any number of articles of any one class, or of any aggregate number of such articles comprised in one or more of such classes, *exceeds* the sum of 10*l*. It applies then to relieve the carrier wholly from liability unless he have omitted to comply with the provisions of the act; or unless the employer or sender have entirely complied with all of them. If the carrier have omitted to comply with any of the provisions; or if the employer have complied with them; the liability of the carrier remains as at common law. The duty of the employer is contained in the first section of the act; the duty of the carrier in the second and third sections; and the fourth abolishes all but statutory public notices.

The following cases have arisen under the act affecting the description of property to which it applies.

Furs—Hats.

In *Mayhew v. Nelson* (*a*), the carrier was charged with a loss of a number of hats, which were stated by a witness to be made half of sheep's wool and half of rabbit's wool. Another witness stated that they were made of felt. It was contended for the defendant, that this evidence exempted the carrier, by bringing the hats within the statutory definition of "furs." Tindal, C. J., thought that the statute referred to articles "made entirely of fur, and not to articles in which there is only a portion of fur;" but he left it to the jury to say whether the hats were made of fur or not; and they found that they were made of wool.

Glass.

In *Owen v. Burnett* (*b*), a case containing a looking-glass above the value of 10*l.* was sent to the carrier's office, with the following notices on the case:—"Plate glass," "looking-glass," "keep this edge upwards;" but the value was not declared, nor any increased charge paid. The glass was broken during the transit, and the carrier was held not liable.

Jewellery.

In *Smith v. London and Brighton Railway Company* (*c*), to a declaration for the loss of jewellery and other valuables, the defendants pleaded that the goods in question were articles above the aggregate value of 10*l.*; and that they consisted of "some or one of such descriptions" as those specified in the act. This plea was held to be argumentative, and bad, on special demurrer, for uncertainty.

Prints and Engravings.

In *Boys v. Pink* (*d*), pictures were held to be within the act.

(*a*) 6 C. & P. 58.

(*b*) 4 Tyr. 133; *infra*, p. 117.

(*c*) 7 C. B. 782; *cf. infra*, "Trinkets," p. 117.

(*d*) 8 C. & P. 361.

Security for Money—Writings—Bill of Exchange.

A security for money, to be within the act, must be of the intrinsic value of more than 10*l.*, when it is delivered to the carrier. Therefore, an imperfect bill of exchange for more than 10*l.* accepted by A., and intended to be filled up with B.'s name as drawer, but which was lost before it was so filled up, was held not to be a security for money above the value of 10*l.* (*f*).

Silks—Trinkets.

In *Davey v. Mason* (*g*), Lord Abinger, C. B., held, that "silk dresses made up for wear, clearly do not come within the meaning of the enactment; nor can a gold chain, used as an eye-glass, be considered as a trinket." But the ruling of Lord Abinger in this case has been questioned, and virtually overruled, by *Bernstein v. Baxendale* (*h*), where the statute was held to apply to a silk guard, and, as it seems, to every kind of unmanufactured or manufactured silk, such as a silk dress. So it would seem from this case that a gold chain, such as was denied to be a trinket in *Davey v. Mason*, would be held now to be within the statutory description; and that generally an article whose primary object is ornament, does not cease to be a "trinket," because some utility is superadded to it. Hence shirt pins, ivory bracelets, gilt rings, brooches, tortoise shell and pearl portmonnaies, and German silver boxes were held in this case to be "trinkets:" and glass smelling-bottles and flagons were held to be either "trinkets," or to be comprised under the statutory description of "glass." But a plain German silver box for holding fusees was held not to be a "trinket."

In *Butt v. Great Western Railway* (*i*), a truss of silk was assumed to be within the act.

(*f*) *Stoessger v. South-Eastern Railway*, 3 El. & Bl. 549; 23 L. J. 1056.

293, Q. B.

(*g*) C. & M. 50.

(*h*) 28 L. J. 265, C. P.; 5 Jur. 1056.

(*i*) 11 C. B. 140; 20 L. J. 241, C. P.

Writings—Certificate.

In *Syms v. Chaplin* (*k*), the carrier was charged with the loss of a bankrupt's certificate; and the plea averred uncommunicated value above 10*l*. But it was found that the value had been communicated, and the plaintiff had a verdict (*l*).

Communication of value.

The sender of goods is bound by the act to take cognizance of the carrier's statutory notice; and in order to attach a liability to the carrier for the loss or damage of goods above the value of 10*l*., at least where the damage is caused by a want of ordinary diligence in the carrier, the sender must make an express formal declaration of the value of the goods, and pay or tender the increased charges according to the rate contained in the statutory notice (*m*). It appeared in that case, that the carrier's agent had a general impression as to the value of the goods, and did not insist on, nor require any express declaration; but it was held by Lord Denman, that the plaintiff, notwithstanding, was bound to have made it.

So, in *Owen v. Burnett* (*n*), the carrier had affixed the statutory notice, and the plaintiff sought to recover for the fracture of a plate looking-glass above 10*l*. in value. The plaintiff, when he delivered it, neither communicated nor was asked to communicate its value. The jury found, not *gross* negligence, but negligence in the defendant, and gave a verdict for the plaintiff; but the court held that, as the plaintiff had not declared the value, the defendant was not liable. The court also overruled an attempt to restrict the statute, according to the words in the preamble, "to articles of great value in small compass;" and held that the "terms of the first section are general, and include

(*k*) 5 Ad. & Ell. 634.

(*l*) Cf. *Hearn v. London and South-Western Railway*, 24 L. J. 180, Exch.; 1 Jur. N. S. 236, and *infra*.

(*m*) *Boys v. Pink*, 8 C. & P. 361; cf. *supra*, *Behrens v. Great Northern Railway*, p. 102.

(*n*) 4 Tyr. 133.

everything" classed under any one of the species, whether large or small.

It has been questioned, and appears to be still uncertain, whether the Carriers' Act is limited to inland carriage in England; or whether it extends to a terminus beyond the realm, as to Jersey or Ireland. But where the terminus is beyond the realm it is clear that the carrier may limit his liability, under the statute, as to that portion of the transit which is within the realm (*o*).

(*o*) *Pianciani v. London and South-Western Railway*, 18 C. B. 226.

CHAPTER VIII.

ON THE LIABILITY OF CARRIERS FOR NEGLIGENCE, AT COMMON LAW, AND UNDER THE CARRIERS' ACT (1 WILL. 4, c. 68).



The degrees of negligence—What is legal negligence—Inevitable accident—Live stock—Negligence in contracts “at the risk” of the sender—Where consignor contributes to the loss—Right of countermand.

IT has been stated (*a*) that great uncertainty of language, and difference of opinion, exist throughout the cases, whenever it has been attempted to define the actual amount of negligence, which is required, in particular bailments, to fix a liability on a bailee, who is not absolutely responsible as an insurer. In the case of a common carrier for hire, it is not, apparently, necessary to investigate the shades and gradations of the scale, because his position as an insurer creates his liability, without evidence, necessarily, that he has been guilty of even the slightest negligence.

But a common carrier, in the common law sense of the term, is a rare and almost extinct specimen of a past era of English law. In the large majority of cases he has been practically converted, either by statute or by special contract, into an ordinary bailee for hire; and it becomes therefore important to define and illustrate, as far as the nature of the subject allows, the degrees of negligence which are sufficient, or insufficient, to impose a liability for loss or damage on such a person. It is the

(*a*) *Supra*, Chapter I., pp. 5, 6.

purpose of this chapter to explain the common law liability, for negligence, of a carrier who stands in the position of an ordinary bailee for hire; and also how far that liability may be modified by special contract or the Carriers' Act.

The subject of legal negligence will be cleared from many of its metaphysical subtleties, if it be regarded as being, in all cases, not a principle, but a fact depending on, and regulated by, the circumstances and complexion of each particular case. There are, it is true, different degrees of care and watchfulness, expected and required, from different classes of bailees; and an act, or an omission, which is culpable in the case of a paid bailee, may be excusable in the case of an unpaid bailee (*b*). But these considerations are substantially questions of fact for a jury, which ultimately resolve themselves into one final question: considering all the circumstances of the contract and the case, was the bailee, or carrier, guilty of *negligence*? If this term be used in its strict and popular sense, it is needless to inquire whether it was slight, moderate, gross, or culpable. A bailee is, in all cases, liable for the consequences of legal negligence; and where he is not liable, it is because the law does not hold his act or omission, with due reference to his legal duties, to be either negligent or culpable. This view accords with that of the highest modern authorities. "I can see no difference," said Rolfe, B., in *Wilson v. Brett* (*c*), between *negligence* and *gross negligence*. It is the same thing with the addition of a vituperative epithet."

It appears, therefore, that this branch of English law will be freed from many superfluous refinements, or inaccuracies, if *negligence* in the performance of a trust be treated, always and abstractedly, as one and the same principle in all cases; but a principle which wears practically the form of a fact, which is to be affirmed or denied, according to special circumstances, by a jury. Every nonperformance

(*b*) *Supra*, Chapter I.

(*c*) 11 M. & W. 115.

of a duty is, or is not, an act of legal negligence. If it be justifiable or excusable because such nonperformance was inevitable; or because the carrier did not expressly or impliedly warrant the safety of the chattel, nor contract to employ more than a certain amount of care, which is found in fact to have been employed; such nonperformance does not fall within a correct definition of legal negligence. If such nonperformance arose from a deficiency in the care and prudence which the carrier expressly or impliedly agreed to employ, the case ranges instantly within the definition; and equally, whether the bailment was originally gratuitous, or for valuable consideration.

Whenever, therefore, it becomes a question whether a carrier has been negligent in the discharge of his trust, the jury must be informed, and must consider, what was the original contract between the carrier and his employer. If it be special and express, no difficulty can arise; because the language of the contract will probably contain all the requisite information. For where the parties have expressly agreed that a certain and defined amount of liability shall attach to the carrier, it will be generally self-evident whether a breach be within or without the limitation.

But where there is no such express or special contract; or where it leaves the carrier's liabilities undefined; recourse must be had to the rules of common law; and it will be essential to ascertain, and to state clearly to a jury, the precise amount of prudence and duty which attach, as inseparable incidents, to the class of bailees within which the carrier is to be placed. It will be for the jury to say, on their application of the doctrine to the facts of the case before them, whether the combination and result require them to convict, or to acquit the carrier of *negligence*.

It is desirable at this point to state, that there appears to be a clear legal distinction, understood and recognized, between *fraud* and *negligence*. Both principles are equally powerful, when established as facts, to avoid or to confirm

a carrier's liability; but, in practice, it is generally the employer who declares on the carrier's negligence, and the carrier who defends himself by pleading the employer's fraud. The averments are, however, essentially different, although the distinctions frequently melt into each other, and become nearly imperceptible. On this ground some writers have held that gross negligence amounts to fraud; and that fraud is only a species of gross and wilful negligence. This was the view of Sir William Jones, who speaks of ordinary negligence as "a mean between fraud and accident;" and of gross negligence as "inconsistent with good faith." But this view, as is clearly shown by Mr. Justice Story, has no foundation in English law; and is even apparently founded on an inaccurate interpretation of the civil law; which, indeed, expressly states gross negligence to be comparable and closely akin to fraud, (*lata culpa, dolo proxima, dolo comparabitur,*) but expressly distinguishes it at the same time (*d*). It is manifest, in short, from every principle of usage and philology, that the essential element of *fraud* is a *moral* deficiency, viz. the want of good faith; that of *negligence* is an *intellectual* deficiency, viz. the want of prudent reflection. The point of resemblance and of junction creates an apparent, but only an apparent, identity. The wilfulness, or malice prepense, of fraud may in some cases appear to be the result of habitual selfishness and indifference to the just rights of others, and so may resemble gross negligence. On the other hand, extreme negligence, as where damage arises from an act which might have been avoided by common prudence, cannot fail, in numberless cases, to create a suspicion, and to have the appearance of wilfulness and fraud. But the relation will continue to be one of analogy, and not of unity; and the occasional difficulty of distinguishing, as between the operations of instinct and reason, is no argument to prove an identity.

(*d*) Story on Bailments, sect. 20.

When negligence is made the basis of a carrier's liability, it must be measured and estimated by the trust contained in the bailment. A breach of such a trust will constitute negligence; but where the trust has been fulfilled it is clear that negligence cannot be found. To determine, therefore, whether a carrier has been guilty of loss or damage by negligence, it is necessary, as a preliminary step, to determine what were the terms of the original trust, and to inquire whether any of them have been broken. If any of them appear to have been broken by the carrier, and if the damage be traceable to the breach, there must be a verdict of negligence against him. If none of them have been broken; or if the damage be not traceable to the breach; he cannot be said to have committed negligence.

First, therefore, let the comparatively rare case be put of damage to goods while they are in the custody of an unpaid carrier. Here the bailment is solely for the benefit of the bailor; and, as the bailee derives no benefit from the trust, it is said that he is bound only to employ *slight* diligence, and is answerable only for *gross* negligence (*e*). Such being his duty, it is clear that an act which would be culpable, or *negligent*, if he were bound to employ *great*, or even *moderate*, diligence, will, in point of law, be neither culpable nor negligent in one who is required to employ only *slight* diligence. But the omission of slight diligence is the commission of *gross* negligence—*i. e.*, of that extreme want of common prudence which constitutes negligence in the particular bailment.

What, then, is slight diligence? It is said to be "that degree of care which persons of less than common prudence, or of any prudence at all, take of their own concerns;" or "which men habitually careless, or of little prudence, generally take of their own concerns" (*f*). This definition appears to be correct: and equally so its converse (by

(*e*) Story on Bailments, s. 23; cf.
supra, Chapter I.

(*f*) Story on Bailments, s. 16.

another American judge cited by Mr. Justice Story), that gross negligence "is that omission of care which even the most inattentive and thoughtless never fail to take of their own concerns." It is this kind of carelessness which is spoken of as *dolo proxima*, or closely akin to fraud; and where the bailment is gratuitous, and for the sole benefit of the bailor, it must clearly approach to fraud before the bailee can be held liable for negligence. He is not required to be very careful; nor even to attain the standard of ordinary prudence: but he must fall below the lowest degree of ordinary prudence before he can be said to have omitted slight diligence, or to have committed legal negligence.

It appears to be understood now, that it is entirely a question for a jury to say whether, under the circumstances of the case, there has been an omission of slight diligence, or a commission of gross negligence, by the carrier. The question is purely one of evidence, if there be any for the jury; but the *onus probandi* lies on the plaintiff (*g*). But it appears that the fact of a gratuitous bailee having taken such care of lost property as he takes of his own, does not create any presumption that he has employed a requisite amount of care (*h*); and he will be liable, as for gross negligence, if he leave the bailed property with his own in an unsafe spot (*i*). He is also bound, in dealing with the chattel, to employ such skill as he possesses; and he will be liable if it appear that he carelessly omitted to use such skill. In this respect a distinction is drawn between the liability of a gratuitous carrier, and a carrier for hire. The former is liable for negligence only in the event of his appearing to have possessed competent skill, and not to have employed it; the latter, or a borrower, is presumed to have competent skill, and the occurrence of damage

(*g*) *Doorman v. Jenkins*, 2 Ad. & Ell. 256.

(*h*) *Ibid.*; cf. *supra*, p. 5.

(*i*) *Rooth v. Wilson*, 1 B. & Ald. 59.

creates a presumption of negligence (*k*). In *Wilson v. Brett*, the defendant, who was a person skilled in horses, gratuitously undertook to ride the plaintiff's horse to Peckham, and exhibit it for sale. He exhibited the horse there on slippery ground, and allowed it to fall several times. In falling it broke its knees. It was held that the judge was right in telling the jury that if they thought the defendant had been negligent in going on the ground, or had ridden the horse carelessly, then they ought to find for the plaintiff. Here the undertaking of an office created a duty to perform it with due care, although the bailment was gratuitous: and so the case fell evidently within that of *Coggs v. Bernard* (*l*).

In *Wilson v. Brett* it was contended that the jury ought to have been told that they should find for the plaintiff, only in the event of their thinking that the defendant had committed gross negligence. But the court appears to have agreed that the question of negligence, or no negligence, was quite sufficiently put; and Rolfe, B., who had tried the cause, stated his inability to see the distinction between negligence and gross negligence. So Alderson, B., has said generally, that "the definition of negligence is the omitting to do something that a reasonable man would do: or the doing something which a reasonable man would not do (*m*). The tendency of the court to identify the liabilities for negligence of unpaid and paid bailees was noticed in the first chapter of this work.

Next we have to consider the essential constituents of legal negligence in a special carrier for hire. In this class, as in the former, the discretion of the jury is nearly unlimited, and must be guided by the circumstances of each case. But the degree of care required from a paid

(*k*) *Wilson v. Brett*, 11 M. & W. 113. and supra, Chapter II.

(*m*) *Blyth v. Birmingham Water-*

(*l*) Cf. *Blackmore v. Bristol and Exeter Railway*, 27 L. J. 167, Q. B., and *works Company*, 11 Exch. 781; 25 L. J. 213, Exch.

bailee is greater than that which is required from an unpaid bailee; and therefore a jury will be more vigilant and jealous in inquiring and considering whether a paid carrier has observed all the precautions of a prudent and conscientious man. He does not insure, but merely undertakes to employ such care as a sensible, experienced and honest man would take of property which does not belong to him; and for the custody and conveyance of which he is to receive an adequate remuneration.

First, he is not liable for loss or damage which arises from inevitable accident. In this respect his liability rests on a basis totally different from that of a common carrier. A common carrier incurs a liability to the full amount of the damage, as soon as it appears that goods have been damaged, while in his custody, without the intervention of the act of God, or of the king's enemies. But before a paid carrier, who is not a common carrier, can be affected with a liability, it must appear that the damage arose from his negligence. Proof of the damage is indeed *primâ facie* evidence of such negligence, but it is not conclusive; and it may be rebutted by evidence, on the part of the carrier, that the damage was caused by unavoidable or uncontrollable circumstances, without the omission, on his part, of any of the reasonable and usual precautions of a competent and careful man. If a jury be satisfied that he used all such precautions; and that his conduct exhibits no deficiency in that skill and prudence which may reasonably be looked for and demanded from a man who impliedly professes both skill and prudence when he undertakes to carry goods or persons for hire; they are bound to find a verdict for him; but otherwise they must find for the customer.

A paid special carrier will not be liable for loss by the act of God, the king's enemies, or tempests: and in this respect has only the same immunities as a common carrier. But, unlike a common carrier, a mere special carrier for

hire will not be liable if goods be consumed accidentally by fire (*n*); or if he be forcibly robbed of them (*o*). In such cases he will not be liable "if he has kept the goods with as much diligence and caution as he would keep his own" (*p*); unless such diligence and caution are evidently below the standard of ordinary prudence (*q*). The same doctrine applies to all such casualties as are within the popular signification of the phrase "inevitable accident" (*r*). When an accident is proved to have been inevitable, it follows that no blame can attach to the carrier: and, consequently, there are no premises from which a jury can infer and pronounce that he has committed negligence.

In all cases in which a carrier is charged with loss, or damage, by negligence, the owner raises a *primâ facie* case of negligence when he has shown that an accident has occurred, and that damage has ensued while the goods were in the custody of the carrier (*s*). It then becomes the duty of the carrier to clear himself, if he can, by showing that the accident occurred, and that the damage ensued, without his fault or want of proper care (*t*); or that, notwithstanding such want of proper care, or notwithstanding even his own negligence, he is protected from liability by the terms of an express contract with his employer (*u*); or that the owner caused or contributed to the accident or damage by his own fraudulent or negligent conduct (*x*). But an accident is not conclusive, but only *primâ facie* evidence of negligence (*y*): and it seems even

(*n*) *Forward v. Pittard*, 1 T. R. 27.

(*o*) *Gibbon v. Paynton*, 4 Burr. 2299.

(*p*) Lord Mansfield, in *Gibbon v. Paynton*.

(*q*) *Clarke v. Earnshaw*, Gow. 30; *Lech v. Maestaer*, 1 Camp. 188.

(*r*) Story on Bailments, 24, n.

(*s*) *Carpue v. London and Brighton Railway Company*, 5 Q. B. 747.

(*t*) *Ibid.*; *Birkett v. Great Western Railway*, 28 L. J. 348, Exch.; *Thompson v. North-Eastern Railway*, 30 L. J. 67, Q. B.

(*u*) *Carr v. Lancashire and Yorkshire Railway*, 7 Exch. 707.

(*x*) *Miles v. Cattle*, 6 Bing. 743.

(*y*) *Bird v. Great Northern Railway Company*, 28 L. J. 3, Exch.

to have been doubted whether it is sufficient *primâ facie* evidence (*z*). If it be so, the presumption is entirely rebutted by evidence that the accident was caused by the wilful act of a stranger (*a*): and if it be doubtful whether the accident proceeded from the negligence of the carrier he will be entitled to the verdict (*b*).

The standard of prudence will be the prudence and common sense of the world generally, and not the judgment of any individual man (*c*). This is so, whether the case be one of a gratuitous bailment, or for hire; and therefore the general and universal principle will resemble that of the last cited case, where the defendant was held liable for negligently constructing a hayrick so near to the plaintiff's property that, in consequence of its spontaneous combustion, the plaintiff's house was burned down.

Where the accident was caused by the bursting of a steam-boiler, it was held, that the jury were properly directed to find that the defendant had committed gross negligence, if they thought that the accident was caused by the servant of the defendants having improperly filled the boiler with water, at a season of the year when such an accident might be reasonably expected from such an act (*d*).

Where goods were lost by a carrier, who had sent them by a waggon with seven horses, but only one driver; held, sufficient to support a verdict of negligence against the carrier (*e*).

(*z*) *Ibid.*; cf. *Phillips v. Edwards and others*, 28 L. J. 52, Exch.

(*a*) *Latch v. Rumner Railway Company*, 28 L. J. 3, Exch.

(*b*) *Tooney v. London, Brighton and South Coast Company*, 3 C. B., N. S. 146; 27 L. J. 39, C. P.; *Whitehouse v. Birmingham Canal Company*, 27 L. J. 25, Exch.; *Cornman v. Eastern Counties Railway*, 29 L. J.

94, Exch.; *Cotton v. Wood*, 29 L. J. 333, C. P.; *Vaughan v. Taff Vale Railway*, Sc. Cam., 5 H. & N. 679; 29 L. J. 41, Exch.

(*c*) *Tindal, C. J., Vaughan v. Menlove*, 3 Bing. N. C. 475.

(*d*) *Bennett v. Dawson*, 4 Bing. 609.

(*e*) *Beckford v. Crutwell*, 5 C. & P. 242.

Where a carrier placed a box with its lid projecting towards the end of the waggon; and the waggon was left at night in the road opposite an inn where the waggoner stopped, without any one to watch it; and the box was forced open, and the goods were stolen; held, that the carrier was liable as for legal negligence (*h*).

So, even where the carrier left his coach for some time at night in the street, with a porter to watch it; and a parcel was stolen from it during his absence; there was held to be evidence of negligence for a jury (*i*).

On the arrival of a parcel at the carrier's office in town, it was sent out to be delivered, with other parcels, in the charge of a man from whose cart it was stolen, while he had left it to deliver some of the other parcels; held, sufficient to support a verdict of negligence (*k*).

If a carrier, believing *bonâ fide* that he is delivering goods to the right consignee, be induced to part with them to a wrong consignee, he will be liable for negligence, if the circumstances under which he delivered them were such as ought to have excited the suspicion of a prudent man. In *Stephenson v. Hart* (*l*), the evidence was held sufficient to charge the carrier for negligence, because it was his duty, when he found that no person of the name of the consignee was known at the address, to have communicated the fact to the consignor; and not to have delivered without receiving further instructions from him (*m*).

In an earlier case, which was not referred to in the last cited, it appears to have been virtually decided that, where a parcel is directed to a person, generally, at a town, without specifying his place of abode, a carrier is not dis-

(*h*) *Langley v. Brown*, 1 M. & P. 583.

(*i*) *Batson v. Donovan*, 4 B. & Ald. 21.

(*k*) *Smith v. Horne*, 2 Moore, 18.

(*l*) 4 Bing. 476.

(*m*) *Infra*.

charged if he deliver it to a person purporting to come from the consignee (*n*).

It has been said, however, that "the misdelivery of a parcel is not necessarily a proof of want of ordinary care; still less of gross negligence, if that word is to be understood as meaning a greater want of care: it may have been an act done by a careful person, who has been deceived by an artifice calculated to circumvent the most careful person" (*o*). It is to be observed, that his Lordship says only, that "a misdelivery is not *proof* of want of ordinary care:" not that it is not *evidence*, which, according to *Stephenson v. Hart*, it must clearly be taken to be. But, even in this point of view, it is difficult to reconcile the *dictum* with the cases. It was stated by Park, J., in *Stephenson v. Hart*, that, "from the cases which have been cited, it is clear that trover lies against a carrier for *misfeasance* in delivering a parcel to a wrong person;" and in an earlier case (*p*), which was approved of in *Stephenson v. Hart*, the carrier was held liable for a misdelivery to a person who claimed a parcel, and in whose honesty he had reason to confide.

Generally, there will be a case of negligence against the carrier, if he or his agents have omitted any precautions which a prudent man ought to have employed. Thus, a carrier has been held liable for negligence, because it appeared that his agent had knowingly suffered a coachman, who was too intoxicated to attend to his duty, to retain possession of a valuable parcel, which he subsequently lost (*q*).

So, where a parcel was sent by a carrier who forwarded it without authority by a different carrier, he was held liable for negligence before the Carriers' Act; notwith-

(*n*) *Birkett v. Willan*, 2 B. & Ald. 357.

(*p*) *Duff v. Budd*, 3 B. & B. 177.

(*q*) *Bodenham v. Bennett*, 4 Price,

(*o*) *Parke, B., in Wyld v. Pickford*, 31. 8 M. & W. 459.

standing that the consignor had been affected with notice that the carrier would not be liable for such parcels (*r*).

The principle on which this case proceeds is, that where a carrier deviates from the terms of his express or implied contract, he will be liable, as for legal negligence, notwithstanding an antecedent breach of duty on the part of the consignor, which would otherwise have exonerated the carrier. A carrier, therefore, who would otherwise be protected, by the terms of his contract to use only ordinary diligence against loss; if the goods be forcibly robbed during the transit, will be liable if the robbery take place during a deviation from the proper road. Thus, where a ship during time of war deviated from its route to chase prizes, and was captured, the owner, who would not otherwise have been liable, was held to be so for the loss of the plaintiff's merchandize (*s*). The same rule holds, if the damage be caused by any species of accident during the deviation; and the carrier cannot defend himself by showing that a similar or worse accident *might* have occurred if he had kept to the regular route. But it will be otherwise if he can show that such an accident either *must* have happened, or would have probably happened, if he had kept to the ordinary road (*t*). There the defendant's barge, laden with lime, belonging to the plaintiff, deviated unnecessarily from its route; and during the deviation encountered a storm, by which the lime was heated, the barge consequently took fire, and both were lost. This evidence was held sufficient proof of negligence in the carrier.

Where the loss arises from the defective state of the carrier's vehicle, he will be liable, although the defect be out of sight, and could be discovered only by a close investigation; and, although the defect be altogether imperceptible, it would appear that a jury may still, on the

(*r*) *Sleat v. Fagg*, 5 B. & Ald. 342.

(*t*) *Tindal, C. J., Davis v. Garrett*,

(*s*) *Parker v. James*, 4 Camp. 112. 6 Bing. 724.

circumstances of the case, find that the carrier has committed negligence(*u*). In *Sharp v. Grey*, an accident occurred from the breaking of an axle-tree of a coach, which had been examined externally, but not internally, before the coach started. It was sworn that the coach had been made of the best materials, and it appeared that the accident was caused by a defect in a portion of the axle-tree, which was embedded in the woodwork, and could not be discovered except by taking the wheel to pieces. The jury found negligence in the carrier, and the court refused to disturb the verdict.

This case is distinguishable from *Christie v. Griggs*(*x*), where the facts were very similar, but where it was said by Mansfield, C. J., that, "if the axle-tree was sound as far as human eye could discover," the carrier was not liable, because "his undertaking went no further than this, that, as far as human care and foresight could go, he would provide a safe conveyance; therefore, if the breaking down of the vehicle was purely accidental, the plaintiff had no remedy." But it was there proved that "the axle-tree had been examined a few days before, without any flaw being discovered in it." And it may be taken that this evidence implies^a that the interior as well as the external part was examined. It appeared, also, that the accident had been directly caused by a defect in the road, and on these facts a verdict was given for the carrier. It must be held, however, that it proceeded on the fact, or the assumption, that the axle-tree had been carefully examined *shortly before*, and that the defect was at that time imperceptible. The case would otherwise be irreconcilable with the *dictum* of Alderson, B., in *Sharp v. Grey*, that "a coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards, and be discovered on investigation;" for "in every contract for the carriage of goods, it is a term of the contract implied by law that the

(*u*) *Sharp v. Grey*, 9 Bing. 457.

(*x*) 2 Camp. 81.

carrier's conveyance is 'tight and fit' for the purpose or employment for which he offers and holds it forth to the public; it is the very foundation and immediate substratum of the contract that it is so: the law presumes a promise to that effect on the part of the carrier without actual proof, and every reason of sound policy and public convenience requires it should be so" (*y*).

In *Lyon v. Mells* it was held, that a carrier by water impliedly promises that his vessel shall be tight and water-proof, and that he is liable for negligence if goods be damaged by leakage.

If a carrier, who has undertaken to carry to a certain terminus, deliver over goods in the ordinary course of his business to another carrier, to be conveyed to such terminus, he will still be liable for any loss by the negligence of such other carrier (*z*).

Where a carrier relies upon any special agreement by which his liability is restricted within that which he incurs at common law; as where he relies on an agreement that he shall not be liable for dangers of the road and accidents generally, he must prove such agreement to have been made (*a*).

Where there was evidence that at a quarter-past five the points of a railway line were right; and that at half-past five the trucks containing the plaintiff's goods went off the line at one of the points, under the lever of which a stone was found to have been inserted, apparently by a stranger; it was held, that there was no evidence of negligence in the defendants; although the jury had found that the defendants ought to have had a servant at the points to look after them (*b*).

(*y*) Per Lord Ellenborough, C. J., *Lyon v. Mells*, 5 East, 437; cf. *Blech v. Balleras*, 29 L. J. 265, Q. B., Hill, J.

(*z*) *Muschamp v. Lancaster and Preston Junction Railway*, 8 M. & W. 421.

(*a*) *Richardson v. Sewell*, 2 Sm. 205; cf. *Collins v. Bristol and Exeter*

Railway, Dom. Proc., 29 L. J. 41, Exch.

(*b*) *Latch v. Rumner Railway Company*, 27 L. J. 155, Exch.; cf. *Cotton v. Wood*, 8 C. B., N.S. 568; *Vaughan v. Taff Vale Railway*, Sc. Cam., 5 H. & N. 679; 29 L. J. 41, Exch., and *supra*, p. 129.

But where a passenger was killed by a collision, caused by the careless management of a railway "switch:" and the company had sometimes a servant to look after it, and sometimes not; and the jury found negligence in the railway company; the court upheld the verdict, and held that the liability of the defendants would be the same, even if the "switch" was actually in the custody of another company (c).

Where the train had gone off the railway at a point to which the improved powers of "fishing" rails had not been extended; the court held, that the judge was justified in leaving the conflicting evidence generally to the jury; and that he was not bound to tell them that the accident was *prima facie* evidence of negligence in the defendants (d).

Some doubt appears to exist as to the extent of a carrier's liability for loss or damage to live stock during the transit. If a carrier be in the habit of carrying live stock, as a common carrier, from place to place, he will necessarily incur the liability of an insurer, unless he limit it by special contract at the time when he receives such live stock. But where he is not a common carrier, and where no such agreement has been made, it appears that he impliedly promises, as in the case of merchandize or other goods, to provide fit and safe vehicles, and to take such care of them, during the transit, as a prudent man would take. If they be animals which are likely to escape, he must secure them properly; and an omission to do so will be strong evidence of negligence. Where a dog was delivered to a carrier with a string round its neck, and was tied by the carrier in a watch-box, where it slipped its head from the noose, and escaped, and was lost; Lord Ellenborough held, that the carrier had become responsible for the safety of the dog, and was bound to take proper

(c) *Birkett v. Whitehaven Junction Railway Company*, 28 L. J. 318, Exch.

(d) *Bird v. Great Northern Rail-*

way, 28 L. J. 3, Exch.; s. v. *Carpue v. London and Brighton Railway*, 5 Q. B. 747; and *supra*, p. 128.

means to secure him; and that the facts were evidence that he had not taken such proper means (*e*).

It may be therefore considered that, in the absence of a special agreement, a carrier who undertakes to convey live stock incurs the same duties and liabilities, and will be responsible, either as an insurer, or for negligence, according to the same rules as exist in the case of ordinary goods. Therefore, if he receive live stock, directed to a particular place, and does not by positive agreement limit his responsibility, there is *prima facie* evidence of an undertaking on his part to deliver safely and securely at the address; and he will be liable for loss or damage by negligence (*f*).

But no carrier, not even a common carrier, is bound to carry live stock, or any other description of goods which he is not in the habit of carrying (*g*); and few carriers of the present time undertake to carry live stock except on terms of limited liability, or total non-liability, for loss or damage. But it is also clear that there is no legal distinction recognized between live stock and goods or wares; and that the principle, by which a carrier's liability for the safety of human beings is regulated, does not apply to the case of ordinary animals.

Thus, in *Palmer v. The Grand Junction Railway Company* (*h*), the declaration charged the defendants, as the owners and proprietors of a railway, with a contract to carry safely and securely for him certain horses of the plaintiff: breach, that the defendants did not use due or proper care in and about the carriage and conveyance; damage, that, in consequence of their taking so little and such bad care, the carriages were thrown off the line and one of the horses killed, &c.

The declaration was substantially proved as to the de-

(*e*) *Stuart v. Crawley*, 2 Stark. 323;
cf. *Harrison v. London and Brighton*
Railway, 29 L. J. 209, Q. B.

(*f*) See *Muschamp v. London*

and *Preston Junction Railway*, 8 M.
& W. 423.

(*g*) *Johnson v. Midland Railway*
Company, 4 Exch. 367.

(*h*) 4 M. & W. 749.

livery of the horses and the fact of the damage ; and the defendants failed to show that they had limited their common law liability by the delivery of a ticket. The jury found gross negligence, and the plaintiff had a verdict.

On a rule to enter a nonsuit, some attempt was made on behalf of the defendant to establish a distinction between a carrier's liability for goods and his liability for live stock ; and Parke, B., is reported to have said : " Does the rule as to negligence apply to live animals, as men or horses ? Of course, where they are stolen, it would ; but is it so where they are delivered, although hurt or damaged ? If misdelivered, the carriers would be liable ; but they would not be liable for a mere accident to a live animal, supposing the carriage to be safe and good and properly conducted" (*i*).

The effect of this remark, if it be correctly reported, appears to contain the undoubted principle that, as in the case of passengers, so in the case of live stock, or indeed of any species of goods, a carrier, who is not a common carrier, is not liable for damage by accident without negligence. It is also understood that even a common carrier does not insure the safety of passengers, and that he is not liable for damage without negligence. But if it is to be understood, as the language of this eminent judge almost seems to imply, that there is one rule of negligence where the damage is to human beings or live stock ; and another where the damage is to ordinary goods or wares ; it is apprehended, deferentially, that this proposition cannot be supported. It is decided, indeed, that even a common carrier is not liable for damage to a passenger except in cases of manifest negligence (*k*) ; but no case has drawn a distinction between a carrier's liability for different kinds of chattels. A passenger has presumably powers of prudent self-control ; and the difficulty of estimating the value of human life and limb appears to be another reason for

(*i*) Ibid. p. 753.

(*k*) Crofts v. Waterhouse, 11 Moore, 138.

exempting the carrier from liability for unavoidable damage to either. But no such presumption arises in the case of the inferior animals; and practically there is no physical, as there is no legal, distinction between them, as things without reasonable volition, which are therefore indiscriminately classed under the term chattel. So, according to the American law, a carrier is not liable without negligence for damage to a slave, although it has been contended that a slave is only a chattel (*l*).

The general result of *Palmer v. The Grand Junction Railway Company* supports this view. Parke, B., himself, in delivering judgment, states the transaction as “simply a contract to carry *goods*,” that notwithstanding a defective declaration, the defendants were, on the facts of the case, to be regarded and treated as common carriers; that, as such, they were liable for all accidents, except such as arose from the act of God or the king’s enemies; and apparently, that if they had not been chargeable as common carriers, they would have been liable for negligence as special carriers for hire, if the notice of action to which their act entitled them had been given.

But although there appears to be no authority for placing the liability of carriers of live stock on the same footing as their liability for the safety of passengers; and although there is no admissible legal distinction between live stock and wares as personal chattels; it must be conceded that the courts have in some instances shown a disposition to require stronger evidence of negligence, in the case of live stock, than they have thought sufficient in the case of ordinary goods. It appears to be held that the tendency of animals to take fright, and become suddenly unmanageable, is a reason, in some cases, for excusing the carrier from the charge of negligence. On this principle, whenever a carrier has expressly exempted himself by special contract from liability for damage to live stock during the transit, the courts are disposed to construe such contracts

(*l*) Angell on Carriers, sect. 122.

strictly, and for the benefit of the carrier; and the language of the judges appears to shadow out the existence of a similarly indulgent common law principle. Thus, in *Carr v. Lancashire and Yorkshire Railway Company* (*m*), Parke, B., said: "Prior to the establishment of railways, the courts were in the habit of construing contracts between individuals and carriers much to the disadvantage of the latter. By the introduction of railways, a new description of property was carried; and many articles are now transferred from one place to another, which had not been commonly carried before. Sheep and other cattle are now ordinarily carried upon railways; and even horses, by means of which the conveyance of goods was effected, are now themselves the subject of conveyance. Therefore contracts are now made with reference to this new state of things; and it is very reasonable that carriers should be allowed to make agreements for the purpose of protecting themselves against the new risks and dangers of carriage to which they are in modern times exposed. Horses are not conveyed on railways without much risk and danger. The rapid motion, the noise of the engine, and various other matters are apt to alarm them, and to cause them to do injury to themselves. It is therefore very reasonable that carriers should protect themselves against loss, by making special contracts." So, in *Chippendale v. Lancashire and Yorkshire Railway Company* (*n*), Erle, J., is stated in the *Jurist Report* to have said: "It is impossible to calculate the risks of the conveyance of animals not domesticated;" and in the *Law Journal* version: "I think that a limitation, however wide in its terms, being in respect of live stock, is reasonable; for though domestic animals might be carried safely, it might be almost impossible to carry wild ones without injury."

These remarks must be qualified now in the case of railway and canal carriers by the new law, which has

(*m*) 7 Exch. 712.

(*n*) 15 Jur. 1107; 21 L. J. 22,
Q. B.

sprung up under the Railway and Canal Traffic Act, 1854, (17 & 18 Vict. c. 31,) which will be considered in a later chapter; but this may be taken as introductory to a question of much interest, which has only been decided lately, and which, perhaps, even now is not entirely free from doubt, viz., whether a carrier can be held liable for any kind of negligence, when it has been expressly agreed between him and the owner of the goods that the conveyance shall be *at the risk* of the latter. Does such a contract exempt a carrier from liability for all, even the grossest negligence; or must it be held—as in common sense and justice it would appear that it ought to be held—that, notwithstanding such an express contract, a carrier is still bound to use ordinary diligence; and that he will still remain liable for such negligence as, with due reference to the special contract, a jury may consider to be gross or culpable? It must be admitted that, if the law be represented by decided cases, there appears, in this instance, to be a distinct conflict between it and natural equity.

Lyon v. Mellis (o), which has been already quoted to establish the duty of carriers in all cases to provide safe and well-constructed vehicles, was one of the earliest cases on this subject. A carrier had there stipulated that he would not be answerable for *any* damage, unless caused by want of ordinary care or diligence on the part of the master or crew; and that in such case he would only be liable to the amount of ten per cent. on the actual damage. The owner signed a notice to that effect. The goods were damaged by the leakage of the defendant's vessel, and it was found that when the goods were shipped the vessel was not in a proper condition to convey them safely, and that the loss was caused by the defendant's negligence. The question was, whether the plaintiff, with due reference to the agreement, was entitled to more than ten per cent. on the damage.

The court held, that the plaintiff was entitled to the full amount; and Lord Ellenborough stated the principle which has been already cited, that every carrier impliedly undertakes that his carriage is "tight and fit for the purpose or employment for which he holds it forth to the public; it is the very foundation and substratum of the contract that it is so." His Lordship proceeded thus:—"It is impossible, without outraging common sense, so to construe this notice as to make the owners of vessels say, 'We will be answerable to the amount of ten per cent. for any loss occasioned by the want of care of the master or crew, but we will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious;' for this would in effect be saying, 'We will be at liberty to receive your goods on board a vessel, however leaky, however unfit and incapable of carrying them; we will not be bound even to provide a crew equal to the navigation of her; and if, through these defaults on our part, she is lost we will pay nothing.' . . . Ridiculous as this supposed state of the agreement must be, yet these and more absurd stipulations must be introduced into it if we give it a construction which shall bring this case within it. . . . Every agreement must be construed with reference to the subject matter; and, looking at the parties to this agreement (for so I denominate the notice) and the situation in which they stood in point of law to each other, it is clear beyond a doubt that the only object of the owners of lighters was to limit their responsibility in those cases only where the owner would have made them answer for the neglect of others, and for accidents which it might not be within the scope of ordinary care and caution to guard against."

It is to be regretted, that this admirable reasoning appears to have been gradually lost sight of in recent cases; and that contracts, in which the goods have been carried "at the risk" of the sender, have been held apparently to relieve the carrier from the obligation to provide

safe vehicles, or even to take ordinary care of the goods during the transit. It is also to be observed that, although Lord Ellenborough, in the latter part of the above judgment, states that it was clear that the owner of the lighter intended only to limit his liability in respect of the neglect of others, and of unavoidable accident, and so apparently decides the question according to the strict construction of the special contract in that case; yet it is also clear, that he contemplated, as an undoubted general principle, the absurdity of any contract, however express and general, containing an implied authority to the carrier to commit acts of wilful misconduct or gross negligence. Accordingly, in *Beckford v. Crutwell* (*p*), Lord Tenterden held, that a carrier was liable at common law for *gross* negligence, notwithstanding the terms of a special contract; or, as his Lordship left it, "for not taking such reasonable care as the common law imposes upon carriers, and from which not even the notice could protect them." Yet, if the latest decisions are to be held law, a carrier, who has expressly agreed with the sender of goods, that the carriage shall be entirely at the risk of the latter, will not be liable if he should wilfully leave the goods to be robbed in a public thoroughfare; nor even if he should deliberately cast or give them away at any point of the transit. It would appear that he is neither bound to provide safe and proper vehicles, nor to employ competent and honest servants; that, in short, he has no definite duty nor liability whatever. However preposterous and inconceivable such a state of law may appear to be, it seems to be the epitome and result of the cases which will now be cited.

In *Shaw v. York and North Midland Railway Company* (*q*), the defendants were charged, as owners of a railway, on a promise to convey safely and securely the plaintiff's horses. Breach, that they took so little and such bad care in conveying them, that, by reason of the

(*p*) 5 C. & P. 242.

(*q*) 13 Q. B. 347; 6 Railw. Cas. 87.

defective state of the carriage, one of the horses was killed. The defendants pleaded, secondly, that they had not undertaken to convey safely and securely; and, thirdly, that they received the horses subject to a contract, that the plaintiff should undertake all the risks of conveyance whatever, &c.

It appeared that the plaintiff had tendered the horses to be carried; that three horse-boxes were shown him in the carriage, to one of which he objected on the ground that the partition was insecure. A company's servant assured him that it had been secured, and the plaintiff then paid the fare, and took the following receipt:—

“N.B. This ticket is issued subject to the owner's undertaking all risks of conveyance whatever, as the company will not be responsible for any injury or damage (however caused) occurring to horses or carriages while travelling, in the loading or unloading.”

During the transit, the horse was killed, owing to the insecurity of the partition. A verdict was directed for the plaintiff on the authority of *Lyon v. Mells*, that the memorandum was subject to an implied exception of injury arising from the insufficiency of the carriage.

On a rule for a new trial, it was contended for the plaintiff that, notwithstanding the memorandum, the defendants were bound to use ordinary care; and the court appears to have been of this opinion, and to have thought that the action would have lain if the defendants had been charged with the breach of a duty to provide proper and sufficient carriages; but the rule was made absolute, because the memorandum disproved the allegation of an unqualified contract to carry safely and securely.

This case, therefore, is not inconsistent with *Lyon v. Mells*, but virtually confirms it. But a slight deviation from the doctrine, that even an express contract must be held subject to certain indelible principles, is perceptible in the next case in the order of date (*r*).

(*r*) *Austin v. Manchester, Sheffield and Lincolnshire Railway*, 16 Q. B. 600; 20 L. J. 440, Q. B.

There the defendants had undertaken to carry the plaintiff's horses; and the plaintiff had signed an agreement that he, the plaintiff, should bear "all the risk of injury by conveyance and other contingencies," and that he should see to the efficiency of the carriages before the horses were placed in them; that he had seen to their efficiency, and that the company should "not be responsible for any alleged defect in their carriages or trucks, nor for any damage, however caused," to the horses. An accident was caused by the wheel of the carriage taking fire by friction during the journey. The defendants were held not to be liable on the terms of the special contract; and it is clear that the accident was precisely one of that class for which the plaintiff had agreed that the defendants should not be liable. It is also clear that no culpable negligence attached to the defendants; but the language of Erle, J., is remarkable. His Lordship said:—

"It is said that the cause of action is the gross negligence of the defendants; but if the matter be looked to carefully, it will be seen that such negligence on the part of the defendants involves the supposition of their standing in a certain relation to the plaintiff, by reason whereof their negligence gives rise to the action. The foundation of the action is a bailment, and the question of negligence always is a question of degree. That which would be negligence under one description of bailment would not give a cause of action under another kind of bailment . . . *When the contract in this instance is looked to, it shows that the defendants expressly provided, when they agreed to take the horses by the particular train, against being called upon to answer for any damage done by reason of the insufficiency of the carriage or otherwise.*" It may be inferred from this language that this distinguished judge considered that the terms of the memorandum in this case constituted a total exemption, for the defendants, from liability even for wilful negligence.

This case is the turning point in the biography of the legal principle under consideration. The courts from this

date have construed all such agreements in favour of the carrier, to the extent, apparently, of not holding him liable for even the grossest negligence, provided the language of the contract can be construed as wide enough to justify it. In *Chippendale v. The Lancashire and Yorkshire Railway Company (s)*, the plaintiff signed an agreement, by which he undertook "all risks of conveyance whatever;" and it was stated that the company would not be responsible for any damage to live stock, however caused. The jury found that injury was caused to the plaintiff's cattle by the truck having been so defectively constructed as to be unfit and unsafe for the purpose of conveying cattle; and there was no evidence that the plaintiff knew of the defect, nor that he had examined, or been required to examine, the truck. But the court held, that the terms of the contract precluded the plaintiff from recovering; and Coleridge, J., expressed an opinion, that the authority of *Lyon v. Mells* must be confined to the special circumstances of that case.

It is observable, however, in the above case, that the court did not expressly state that the carrier would not be liable if the negligence had appeared to be wilful; and, although the evidence and verdict seem to have established that the carriage was really unfit to convey cattle, Erle, J., rested his judgment on the assumption that it would have been "fit for an ordinary journey, and for an ordinary freight of dead weight; but the freight being live animals, it seems they were alarmed and escaped, and thereby the injury ensued. That is peculiarly the risk which the company absolve themselves from." Some importance was also attached by Coleridge, J., to the fact that the plaintiff had had an opportunity of examining the carriage; but the general result of the case appears to be that, although the damage was caused by an omission of the defendants to provide a proper vehicle, as in *Lyon v. Mells*, and, although the terms of the memorandum, as in that case, apparently referred only to damage occurring, during the transit, in a

(s) 15 Jur. 1106; 21 L. J. 22, Q. B.

carriage which was, impliedly, to be sound and safe at starting; yet, as the plaintiff undertook "all risks of conveyance," he had impliedly absolved the carrier from a loss caused by gross negligence.

This case was followed up by the *Great Northern Railway v. Morville* (*t*), in which the same court, and the same judges, held the same doctrine. But in this case the sender had not only undertaken to bear "all the risks of injury by conveyance," but, as in *Austin v. Manchester and Sheffield Railway* (*u*), had examined and satisfied himself as to the efficiency of the carriage. The damage, however, was caused by the negligence of the company's servants in moving the truck, in which the plaintiff's horses were, across the line. The defendants were held not liable.

In *Carr v. Lancashire and Yorkshire Railway Company* (*v*), the declaration charged the defendants, as common carriers, with an undertaking to carry the plaintiff's horse, subject to a condition that the plaintiff should undertake "all risks of conveyance whatsoever;" and that the defendants should "not be responsible for any injury or damage, however caused," during the transit. The jury found the declaration proved; and that, by the gross negligence of the defendants, the horse-box was propelled against a truck, and the horse killed. Verdict for plaintiff for full amount.

This case may be held to be the climax of the new doctrine which has gradually superseded that of *Lyon v. Mells*. The carriers were held, on the terms of the contract, to be wholly exempt from liability, even for their *gross* negligence. Parke, B., said:—"The jury have found that the defendants have been guilty of gross negligence; and therefore it may be taken, upon this record, that the breach, if any, was so occasioned. Now, I am of opinion, that, by entering into this contract with reference to the

(*t*) 21 L. J. 319, Q. B.

(*v*) 7 Exch. 707.

(*u*) *Supra*, p. 143.

subject-matter, the owner has taken upon himself all risk of conveyance, and that the railway company are bound merely to find carriages and propelling power. The contract appears to me to amount to this: the company say they will not be responsible for any injury or damage, *however caused*, occurring to live stock, of any description, travelling upon their railway. This, then, is a contract, by virtue of which the plaintiff is the party to stand all risk of accident and injury of conveyance. . . . It is not for us to fritter away the true sense and meaning of these contracts, merely with a view to make men careful. If any inconvenience should arise from their being entered into, that is not a matter for our interference; but it must be left to the legislature, who may, if they please, put a stop to this mode which the carriers have adopted of limiting their liability. We are bound to construe the words used, according to their proper meaning; and, according to the true meaning and intention of the parties, as here expressed, I am of opinion that the defendants are not liable."

The rest of the court concurred substantially in this view as to the particular case. Martin, B., held, with Parke, B., that such an agreement absolved the carrier even from gross negligence in *all* cases; but Alderson, B., thought that "possibly a question might be made whether the injury contemplated was not such as must issue in injury to the thing conveyed, so that a doubt might arise whether the case of the horse being stolen was contemplated, as, under such circumstances, the accident would not issue in injury to the horse conveyed." But Platt, B., doubted altogether the universality of the doctrine that such a ticket "absolves the carriers from their gross misconduct;" and added: "I own I am very much startled by such a proposition; though, considering the high authority by which it is supported, I feel I ought to doubt and mistrust my own opinion. But I am bound to say, that I am not satisfied that the language of this ticket ab-

solves the railway from such liability for damage. I cannot help thinking that the owner of the goods never dreamed of such a thing when he signed the contract. . . . The case of gross negligence, as it seems to me, is not pointed at by the ticket." The reasoning of this learned judge must be echoed by every political economist.

This doctrine seems also to have been doubted in *M'Andrew and others v. Electric Telegraph Company* (x), where the action was for a mistake in the transmission of an unrepeatd message; and the defendants relied on a special contract by which they stipulated that they would "not be responsible for mistakes in the transmission of unrepeatd messages from whatever cause they may arise." No gross negligence was shown to have been committed by the defendants; and they were held to be clearly protected by their special contract; but Jervis, C. J., intimated that it would not have protected them "against gross negligence." And it is clear that nothing but the most explicit stipulation will protect a carrier against gross negligence; and that every ambiguity will be construed against him. Thus, where a bill of lading stipulated that a carrier should "not be accountable for leakage or breakage," he was held to be liable for damage arising from his gross negligence in the stowage of goods (y). Cockburn, C. J., said: "I admit that a carrier can protect himself from the effects of his own negligence by a contract to that effect, if he can find any one to contract with him. I think, however, that we ought not to put that construction on a contract, unless it is unambiguous in its terms." Accordingly, where common carriers of a cask of brandy, stipulated expressly that they would not be liable "for any loss or damage to such goods, arising from any cause whatever, during the transit;" they were held to be protected from responsibility for damage by leakage. It is to be observed, however, that in this case there does not seem

(x) 25 L. J. 26, C. P.

(y) *Phillips v. Clark*, 26 L. J. 168, C. P.

to have been evidence, even of ordinary negligence; and the question, what would have been the liability of the carrier for gross negligence, was left untouched.

However, it appears to be assumed that a general undertaking on the part of the sender that he will be responsible for "all risk of conveyance," and that the carrier shall be irresponsible for damage, constitutes for the carrier, at common law, and irrespectively of the Carriers' Act, and of the 17 & 18 Vict. c. 31, a total exemption from liability, even for gross negligence (z). But the liability of a carrier for negligence under the Carriers' Act (1 Will. 4, c. 68); and the liability of railway and canal carriers under the 17 & 18 Vict. c. 31, depend respectively on different principles. That of railway and canal carriers will be discussed in the chapter on railway carriers. Here the liability of carriers, at common law, as affected only by the 1 Will. 4, c. 68, will be considered.

The progress of judicial opinion has been marked by nearly as many fluctuations in settling the construction of this statute, in this respect, as in determining the effect of a special contract of immunity from all risks at common law. In an early case (a), the plaintiff declared on the damage to goods during the transit. The defendant pleaded not guilty, the statutory notice, and non-communication of the value of the goods which was above 10*l*. The plaintiff replied *de injuriâ*.

The declaration and the plea were both proved; but it was submitted for the plaintiff, that the defendant would be liable, notwithstanding the statute, if the jury should think that the defendant had been guilty of *gross negligence*. Lord Denman told the jury, in the first place, to consider whether the injury arose from the *negligence* or *gross negligence* of the defendant. They found that it

(z) Cf. Cockburn, C. J., in Phillips v. Clark, *supra*; cf. the judgment of Erle, J., in M'Manus v. Lancashire and Yorkshire Railway, 4 H. & N. 327; 23 L. J. 353—356, Exch. Sc.

Cam.; and Blackburn, J., in Harrison v. London and Brighton Railway, 29 L. J. 219, Q. B.

(a) Boys v. Pink, 8 C. & P. 361.

arose from the *negligence* of the defendant; and his Lordship directed a verdict on the general issue for the plaintiff, and on the special plea for the defendant.

It is clear from this case, that Lord Denman entertained a doubt whether a carrier would be liable or not for gross negligence, when protected by the statute. In *Wyld v. Pickford* (*b*), a case since the act, but in which the act was not pleaded, and which it did not affect, because the carriage was partly by water, Parke, B., inclined to the opinion, that where a notice was good in other respects, a carrier would still be liable for *gross negligence*; but as the special language of the act was not under consideration in that case, it cannot be held to have been affected by it.

But in *Owen v. Burnett* (*c*), the goods (a looking-glass) were within the statute, and the statute was pleaded. The glass was damaged, according to the finding of the jury, by the *negligence* of the carrier; but he was held not to be liable because this finding did not charge him with *gross negligence*. The court, however, clearly held that the carrier would have been liable, notwithstanding the statute, if he had committed either wilful misfeasance or gross negligence. Bayley, J., said: "I think that this case is within the act, and that, therefore, the plaintiff cannot recover for the loss sustained; no wrongful conduct, or gross negligence amounting to a misfeasance, having been established to take the case out of the protection of the statute. Gross negligence has been held in many cases to affix a liability on a carrier to which he would not otherwise have been subject. Thus, had the defendant dashed the glass against the ground, that wrongful act would have made him liable." His Lordship then referred to several cases before the act, and added: "In all those cases misfeasance had taken place; whereas here there is no misfeasance or gross degree of negligence, throwing the responsibility on the carrier notwithstanding

(*b*) 8 M. & W. 443.

(*c*) 4 Tyr. 133.

the act." The other judges concurred in this view, and Vaughan, J., expressly said: "Had gross negligence appeared, the carrier would have been liable, notwithstanding the act." This case preceded *Boys v. Pink*.

But in *Hinton v. Dibbin* (*d*), the precise question arose: and it was determined by the Court of Queen's Bench, that a carrier, protected by the statute, is not liable for damage caused by his *gross* negligence. The case deserves the most attentive consideration.

The declaration charged the defendants, as common carriers, with damage done to the plaintiff's goods by the misfeasance, gross negligence, and wrongful conduct of the defendants. The plea averred the statutory notice and the non-communication of value. Replication—that the damage was caused by the "gross and culpable negligence and wrongful and improper conduct of the defendants, and by their gross and utter neglect, wilful default, and entire and absolute want of care and caution." Rejoinder—that such want of proper care, &c. was the fault of the servants of the defendants. General demurrer. The plaintiff's points were, first, that the statute does not protect the carrier from losses through misfeasance or gross negligence; secondly, that their liability extended to the misfeasance and gross negligence of their servants.

The defendants contended that, under the statute, they were neither liable for their own gross negligence, nor for that of their servants. Erle for plaintiff; Sir William Follett for defendants. After a most elaborate argument, the court took time to consider its judgment, and Lord Denman, C. J., delivered it.

His Lordship distinguished carefully between the common law doctrines on the subject; and the view which he conceived himself bound to take by the express language of the statute. He considered that as the charge of "misfeasance" contained in the declaration had been dropped in the replication, the question was simply one as to the

liability of a carrier under the statute for "gross or culpable negligence," as distinguished from "wilful misfeasance." He treated the case as the first which had arisen under the act; and considered that the language of the judges, in *Owen v. Burnett*, must be regarded as *obiter dicta*, because there the defendant was charged with *negligence* only, and not with *gross negligence*. His Lordship then considered the objects and language of the statute in detail; and especially the preamble and first section, by which it is declared that, unless the sender have complied with the terms of the act, "no carrier shall be liable for the loss of or injury to any article or articles of property" therein specified. He referred to the 8th section, by which it is enacted, that "nothing in the act shall be deemed to protect any carrier from loss or injury to any goods, &c. arising from the felonious acts of 'a servant.'" "The former branch of this clause," his Lordship said, "is, to say no more, at least consistent with the supposition that for conduct short of felony the carrier is no longer liable: whereas it is obvious, that, before the passing of the act, the carrier would have been liable for acts of the servant not amounting to or approaching to felony—negligence." His Lordship then said: "Upon the whole, the language of the first section seems to me to be perfectly clear and unambiguous, without exception or restriction, and that none can fairly be implied from any other part of the act. By holding the carrier exempt from liability as to the enumerated articles, unless the owner shall declare their nature and pay for them in the manner prescribed, we not only further the object avowed in the title and preamble of the act, but give it the effect of removing doubts and difficulties, which, (as we have seen,) it is admitted, did exist as to the liability of a carrier for the loss of goods, who has sought to limit that liability by the publication of a notice in the usual form."

The view of the court is expressed so distinctly in this elaborate judgment of Lord Denman, that it would be presumptuous to question it; and it must be taken to be a

correct, or at least a practical, exposition of the existing law. Still it may be observed, that there are points which might obviously be taken, if it should ever be brought before a court of error. It may be remarked, in the first place, that the case, as it is reported, does not manifestly relieve carriers from liability in all cases of gross negligence; and that the court was not required to consider what their judgment would have been if the "gross negligence" had amounted to "wilful misfeasance." Accordingly Sir William Follett, the counsel for the defendants, while contending that they were not liable for "gross negligence," said, "wilful misfeasance would of course come under a different consideration; if he intentionally misdelivered the parcel, trover would lie. There the act is tortious, without reference to the peculiar duty imposed by the character of the carrier." So also, as suggested by Coleridge, J., in such a case as *Garnett v. Willan* (*e*), where the carrier was held liable for sending goods by a different and unauthorized carrier; it would appear that, even since the statute, this would be constructively such an act of misfeasance, over and above gross negligence, as might render the carrier liable.

It may also be submitted, that the words of the statute, although undoubtedly large and comprehensive, are not more so than the terms of the various special contracts which have been considered in the present and the preceding chapters; that, as most of those cases are subsequent to *Hinton v. Dibbin*, they may be regarded as either directly or indirectly controlling it; and that, although the general result may be deemed rather to confirm than to weaken its authority, yet it must be taken as subject to the doubts and uncertainties which more than one learned judge have felt and expressed. Thus, in *Austin v. Manchester, &c. Railway* (*f*), *Hinton v. Dibbin* was cited as an authority, in a case of special contract, to show that where the owner has undertaken "all risks," carriers are

(*e*) 5 B. & Ald. 53.

(*f*) 16 Q. B. 600; 21 L. J. 179, C. P.; *supra*, p. 143.

not liable for gross negligence; and Jervis, C. J., then said: "It seems an alarming proposition to say that they can exempt themselves from all liability. Supposing they were to be treated as gratuitous bailees, would they not be liable for gross negligence?" It is clear also, from *Hearn v. London and South-Western Railway* (*g*), that there are certain losses by a carrier's negligence from which even the statute does not protect him; as where the owner has not communicated value, but relies on a loss caused by the delay of the carrier in delivering the goods. It may also be added, that it appears to have been the impression of the late Mr. J. W. Smith, writing on the authority of *Owen v. Burnett*, and before *Hinton v. Dibbin*, that "the protection given to the carrier by the act is substituted for the protection which he formerly derived from his own notice; and the former, therefore, will not protect him in a case in which the latter would not have been allowed to do so, in consequence of his misconduct" (*h*).

The last description of negligence, which will be considered in this chapter, is, where the owner of goods, or a passenger, has caused or contributed to the damage, with which the carrier is charged. The general result of the cases on this subject appears to be the following:—If the damage be directly traceable to the owner's own negligence; as if he pack goods carelessly and insecurely, so that they are peculiarly liable to damage by reason of some latent defect or omission, which is wilfully concealed from the carrier, and against which, therefore, he cannot be expected to guard; the loss is held to be attributable to the sender's, and not to the carrier's negligence. But where the goods are known by the carrier, at the time when he accepts them, to be of a perishable kind; and generally, if he omit to ask questions as to the nature of the goods, he will be liable, notwithstanding the sender's omission to state their contents, unless they come within

(*g*) 24 L. J. 181, Exch.

and Yorkshire Railway, 28 L. J. 355,

(*h*) 1 Smith's Lead. Cas. 103; s. v.

Exch.

Erle, J., in *M'Manus v. Lancashire*

the provisions of the Carriers' Act. Therefore, if a carrier receive goods which are insecurely packed, he will clearly be liable for damage arising from such insecurity, if it be apparent at the time when he accepts them (*i*). And he will also be generally liable, notwithstanding the omission or refusal of the sender to state their contents, except under the act (*k*).

But the carrier will not be liable if the owner expressly retain possession of the goods during the transit; and it will be a question for a jury whether, when he accompanies the goods, he ever parted with the possession (*l*). Similarly, the carrier will not be liable when the goods remain in the possession of the sender's agent, and when the carrier has actually or virtually no control or custody of them (*m*), or where the sender resumes possession before the end of the transit (*n*). In all such cases, if there be reasonable evidence that the damage is attributable to the owner's retention or resumption of possession; or other imperative interference with the goods; the negligence will be treated as his, and the carrier will be exonerated (*o*).

But a more doubtful case arises where the damage is caused partly by the negligence of the sender or owner, and partly by the negligence of the carrier. It is clear, as a general principle, that where the carrier pleads that the damage was caused by the owner's negligence, such negligence must be subsequent, and cannot be antecedent to the bailment; because the carrier waives defects by accepting delivery. Where, therefore, the defence sets up the negligence of the owner; such negligence must appear to have occurred during the transit; and the consequent damage must be shown to have been its natural and probable result. But where the damage is the result of the negligence both of the owner and the carrier, the carrier

(*i*) *Stuart v. Crawley*, 2 Stark. 323.

L. J. 137, C. P.; and *supra*, p. 43.

(*k*) *Crouch v. London and North-Western Railway*, 14 C. B. 255; 23 L. J. 73, C. P.

(*m*) *East India Company v. Pullen*, 2 Stra. 690.

(*l*) *Butcher v. London and South-Western Railway*, 16 C. B. 13; 24

(*n*) *Sparrow v. Caruthers*, 2 Stra. 1235.

(*o*) See Chapter IV., *ante*.

will be exonerated, apparently, only in the event of the damage being traceable at least as much to the owner's negligence as to that of the carrier; and the latter will still be liable, if, notwithstanding the owner's negligence, he might by ordinary prudence have prevented the damage. It has been said by Lord Ellenborough, C. J., that "one person being in fault will not dispense with another's using ordinary care for himself," (*p*) where it was held, that the defendant was not liable for damage caused by obstructing a road, because the plaintiff, if he had used ordinary care, might have seen and avoided the obstruction.

This case supports the doctrine, that, notwithstanding the owner's negligence contributing to the damage, the carrier will still be liable for his own negligence, if he might by ordinary care have avoided the consequences of the owner's negligence. The converse of this rule has been thus stated by Parke, B., who has said, that "the rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester*; and that rule is, that although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong" (*q*). By applying this doctrine to cases of negligence, which is distributable between the carrier and the owner, their relative liabilities will be apparent (*r*).

In cases of collision it is held that, "if the mischief be the result of the combined negligence of the two, they must both remain *in statu quo*, and neither party can recover against the other" (*s*). Thus, where a child of five

(*p*) *Butterfield v. Forrester*, 11 East, 60.

(*q*) *Bridge v. Grand Junction Railway Company*, 3 M. & W. 248; *Tuff v. Warman*, Sc. Cam., 5 C. B., N. S. 573; 27 L. J. 322, C. P.

(*r*) See also *Davies v. Mann*, 10 M. & W. 549; *Martin v. Great*

Northern Railway, 16 C. B. 179; 24 L. J. 209, C. P.; *Morgan v. Ravey*, 30 L. J. 131, Exch.; *Ashworth v. Stanwix*, 30 L. J. 183, Q. B.

(*s*) Per Bayley, B., *Vennale v. Carver*, 1 C. & M. 22; *Cotton v. Wood*, 29 L. J. 333, C. P.

years, while under his grandmother's care, was knocked down by the train of the defendants; it was held, that the child could not recover, although the defendants had committed negligence, because the grandmother had also committed such negligence as would have disentitled her to recover if the injury had happened to herself (*t*). In such a case it has been said, that "it is equally the duty of foot passengers, wishing to cross the streets, to look out for vehicles, as it is for the drivers to look out for foot passengers; and, in case of an accident, when the balance is even as to which party is in fault, the one who relies upon the negligence of the other is bound to turn the scale" (*u*). In that case the plaintiff's wife had attempted to cross a London street, on a dark and snowy night, where, however, the street was well lit by gas; and, startled by another vehicle, she hurried back, and was run over and killed by the defendant's omnibus, which was coming up at the usual pace, and on the proper side of the road. At the time of the accident the driver had turned his head back to speak to the conductor, and did not perceive the woman until it was too late to stop the horses. A verdict, found for the plaintiff, was set aside on the ground that it did not appear that the driver had been speaking to the conductor for any but a lawful purpose; and that there was just as much reason for saying that the woman had run against the horses as that the horses had been driven negligently against her (*x*).

Where the defendants had a urinal with the inscription "For Gentlemen" over it, where there was a lamp burning; and an adjoining door marked "Lamp Room," where there were steps down, and no lamp; and the plaintiff, asking a stranger the way to the former, and being directed to it,

(*t*) *Waite v. North-Eastern Railway*, 28 L. J. 258, Q. B.; Sc. Cam. affirming judgment below.

(*u*) Per Erle, C. J., in *Cotton v. Wood*, 29 L. J. 334, C. P.

(*x*) *Ibid.*; cf. *Cornman v. Eastern Counties Railway*, 29 L. J. 94, Exch.; *Ellis v. London and South-Western Railway*, 2 H. & N. 424; 26 L. J. 349, Exch.

entered hurriedly, and by mistake, the latter; and, falling down the steps, sustained the damage for which he sued the defendants; it was held, that there was no evidence of negligence on their part (*y*).

But the duty of a carrier, whether common or special, to convey safely and securely, is of a more stringent and personal kind than the duty to avoid an injury to a stranger; and the exoneration of the carrier will be proportionably less complete, where he has committed any degree of negligence. The whole question whether the loss is to be treated as having been caused by the owner's negligence, or by that of the carrier, will, when properly pleaded (*z*), be for the jury. Thus, in *Brend v. Dale* (*a*), where the carrier set up the defence that the sender expressly agreed to accompany and watch the goods, and that the loss was caused by his failing to do so; Lord Abinger left it to the jury to say whether the loss arose from the negligence of the plaintiff, or from that of the defendant; and stated that, according to the finding, the verdict would be entered for the former or for the latter.

Before concluding this portion of the subject, it may be desirable to state that questions have arisen as to the right of an owner to sue a third party who has caused the damage during the transit. The questions have generally arisen where the owner of the goods, or a passenger, has sustained damage by a collision during the transit; but the cases are clearly applicable to damage by such third party to goods in the custody of the carrier. Where the damage is caused wholly by the negligence of such third party, he will clearly be liable for the full amount to the owner or to the carrier; but where the damage has been caused wholly, either by the negligence of the owner or the carrier, such third party will not be liable. Where also the negligence is apportionable between the owner or

(*y*) *Toovey v. London, Brighton and South Coast Railway*, 27 L. J. 39, C. P.

(*z*) *Brend v. Dale*, 2 M. & W. 775.
(*a*) 2 M. & R. 80.

the carrier on the one hand, and such third party on the other, the latter will be liable, or not liable, according to the rules already stated to exist in a similar issue between the owner and the carrier (*a*). But it was uncertain until lately how far such third party is liable where the owner or passenger is innocent, and the negligence distributable between the carrier and third party; as where an accident is caused by a collision, or by the carrier racing with another carrier. It has been stated, in a work of high authority (*b*), that "if two drunken coachmen were to drive their respective carriages against each other and injure the passengers, it is inconceivable that each set of passengers should, by a fiction, be identified with the coachmen who drove them, so as to be restricted for remedy to actions against their own driver or his employer." But it has since been decided, that no action lies for the passenger against the other carrier; and that, having deliberately chosen his conveyance and his driver, he must be bound by the acts of the latter, and be identified with his negligence (*c*). In that case the plaintiff's testatrix was stepping incautiously out of an omnibus, while the defendant's omnibus was passing; and it appeared also, that the omnibus, in which she was, had also drawn up incautiously. At that moment the defendant's omnibus, which was not proved to have been driven incautiously, drove past, and the testatrix was run over and killed. The learned judge told the jury, that if they thought the injuries caused by an accident, or that the deceased was wanting in care, or the driver of the omnibus, in which she was had been so wanting; or that either the deceased or the driver of his omnibus had conduced, by want of care, to the accident; the verdict must be for the defendant, notwithstanding that he had been also guilty of negligence. The court approved of

(*a*) *Bridge v. Grand Junction Railway Company*, 3 M. & W. 244; *supra*, p. 156.

(*b*) 1 Smith's Leading Cas. 132 a.

(*c*) *Thorogood v. Bryan*, 8 C. B. 115.

this direction. The judgment of Maule, J., is important. Referring at the outset to *Bridge v. Grand Junction Railway Company*, his Lordship said: "The Court of Exchequer there seem to have thought—though it was not necessary to decide it—that where there is negligence on both sides the action cannot be maintained. Although I at one time entertained a contrary impression, upon further consideration, I incline to think that, for this purpose, the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased. If the deceased himself had been driving, the case would have been quite free from doubt. So there could have been no doubt, if the driver had been employed to drive him, and no one else. On the part of the plaintiff it is suggested, that a passenger has no control over the driver. But I think that cannot with propriety be said. He enters into a contract with the owner, whom, by his servant the driver, he employs to drive him. If he is dissatisfied with his conveyance, he is not obliged to avail himself of it. According to the terms of his contract, he unquestionably has a remedy for any negligence on the part of the person with whom he contracts for the journey. It is somewhat remarkable, that actions of this sort are almost invariably brought against the rival carriage or vessel; which is only to be accounted for by that party spirit which, more or less, enters into every transaction of life. If there is negligence on the part of those who have contracted to carry the passengers, those who are injured have a clear and undoubted remedy against them. But it seems strange to say that, although the defendant would not, under the circumstances, be liable to the owner of the other omnibus for any damage done to his carriage, he will still be responsible for an injury to a passenger. The passenger is not without remedy. But as regards the present defendant, he is not altogether without fault. He

chose his own conveyance, and must take the consequences of any default of the driver whom he thought fit to trust. For these reasons, it seems to me that the ruling of my brother Williams was quite correct.”

But a plaintiff in such a case will not be disentitled to recover against a third party, merely because his own carrier has been slightly imprudent, unless the jury should think that such imprudence substantially caused or contributed to the damage. Thus, where the omnibus, in which the plaintiff was, was racing with that of the defendant, which, in trying to pass a cart rapidly, came in contact with the first, and caused the damage: the jury found that the collision was entirely owing to the carelessness of the driver of the second omnibus, and the defendant was held liable (*d*).

A distinction has been engrafted on *Thorogood v. Bryan*, which appears to amount to the principle, that, where a third party seeks to clear himself by showing that the damage was partly caused by the negligence of the employer, or his carrier, such partial damage must be the proximate, and not merely the remote, result of the employer's or carrier's negligence. In *Greenland v. Chaplin* (*e*), the damage was caused to the plaintiff by the defendant's negligence, in consequence of which the steamboat of the latter struck the bow of the boat where the plaintiff was standing, and knocked down an anchor, which consequently fell, and broke the plaintiff's leg. It was contended for the defendant that the plaintiff had contributed to the accident by his negligence in standing near the anchor; and also, that it would not have fallen if it had been properly stowed. But neither of these propositions had been proved or found at the trial; and the court seems to have thought that, even assuming them as facts, they did not prove any negligence, which could be taken “in any degree to have contributed to the immediate cause of the accident;” and that “a person who is guilty of negli-

(*d*) *Rigby v. Hewitt*, 5 Exch. 240;
19 L. J. 291, Exch.

(*e*) 5 Exch. 243; 19 L. J. 293,
Exch.

gence, and thereby produces injury to another, has no right to say, 'Part of that mischief would not have arisen if you yourself had not been guilty of some negligence.'" But Pollock, C. B., in thus delivering the judgment of the court, doubted "whether a person, who is guilty of negligence, is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and that no reasonable person would have anticipated. Whenever that case shall arise," his Lordship said, "I shall certainly desire to hear it argued, and to consider whether the rule of law be not this: that a person is expected to anticipate and guard against all reasonable consequences; but that he is not by the law of England expected to anticipate and guard against those which no reasonable man would expect to occur." It will be apparent that this doctrine in no way clashes with *Thorogood v. Bryan*; but is only a more distinct enunciation of the principle of *Butterfield v. Forrester*, that one man's carelessness will not justify another man's negligence, unless both parties are active agents in the damage. In this respect the person who actively causes the damage is liable, unless the person who suffers it could, by ordinary foresight and prudence, have anticipated, expected, and provided against the accident (*f*).

In the event of accidents, as by fire, in the case of railway and other companies, who have statutory powers to use locomotive engines, or to do other acts which are necessarily productive of some risk and danger; there is no liability for damage, unless it be caused or accompanied by express and actual negligence in fact (*g*).

Before closing this chapter it may be well to notice the right of countermand which an owner or passenger retains

(*f*) *Tuff v. Warner*, Sc. Cam, 5 C. B., N. S. 573; 27 L. J. 322, C. P.

(*g*) *Green v. London General Omnibus Company*, 29 L. J. 13, C. P.; *Vaughan v. Taff Valley Railway*, 5

H. & N. 679; 29 L. J. 247, Exch.; Sc. Cam. *Cowley v. Mayor of Sunderland*, 30 L. J. 127, Exch.; *Hole v. Sittingbourne Railway*, 30 L. J. 81, Exch.

throughout the transit. When goods are delivered to a carrier, or other bailee, for hire, and he is instructed to deal with them in a particular manner, he is bound to deal with them in such manner, unless he expressly dissents, and receives a modification of the order before he accepts them (*h*). But every contract with a carrier is also subject to an implied right of countermand, which the sender has a right to exercise at any point before the termination of the transit; and if the carrier, or his agent, after having received such countermand, forward the goods to their original destination, he will be liable for a breach of contract. "If a carrier undertake to carry goods from A. to B., he does so, subject to a right in the owner to countermand the direction at any point of the journey; and though he may be bound to pay the carrier for his trouble, yet the latter has no right to carry them further against the will of the owner of the goods" (*i*). There goods were delivered to the defendants to be sent to London and forwarded to Australia; but before the goods arrived in London, the plaintiff countermanded the order to forward them to Australia. The goods were notwithstanding forwarded to Australia and lost. It was held, that the plaintiff had a clear right to give the countermand: and that the defendants were liable for not obeying it. In this case the defendants would apparently have been equally liable, if there had been no countermand, for a non-delivery or negligent delivery; but the legitimate inference from the case appears to be, that when a carrier has received a countermand, and does not comply with it, all his subsequent acts are in the nature of negligence; and he will be liable for all the expense and proximate damage which may result to the owner from the non-compliance with the countermand.

It was intimated, however, in the above case, by Maule, J., that there may be cases in which a carrier will not be

(*h*) *Struter v. Horlock*, 1 Bing. 34. *Staffordshire Railway Company*, 8

(*i*) *Parke, B., Scothorn v. South* Exch. 341; 22 L. J. 121, Exch.

liable for disobeying an unreasonable countermand. His Lordship said: "A carrier is employed as a bailee of another's goods to obey his directions concerning them; and I have no hesitation in saying, that, generally, at any period of the transit, he may have them back. It may, indeed, be different when the subsequent direction to the bailee is unreasonable. I can conceive a case, where goods having been put into a place from which they could not be removed without the greatest inconvenience, the carrier would be entitled to refuse to deliver them up before the end of the journey. But I think that if a traveller by railway is dissatisfied with his mode of travelling, he may at any point stop and require that his luggage should be delivered to him."

It is on this principle, apparently, that where a carrier contracts specially to carry a passenger or goods from A. to B., at a fixed charge, the passenger has still a subsisting common law right to be put down, or to have his goods delivered, at any point of the transit where the carrier stops, or where it is reasonable that he should stop; and this, although the passenger or owner knew, when he contracted with the carrier, that the fare of the latter to the ulterior point was less than the fare to the intermediate point. Thus, in *Reg. v. Frere (k)*, by a bye-law of a railway company, which was binding on the defendant, no one had a right to travel on the line without having previously paid his fare for the distance which he meant to travel. On the day of the journey the fare to Norwich by the railway was 5s., and the fare to Diss, a shorter distance than Norwich, 7s. The defendant, intending to travel only to Diss, paid the less fare for a ticket which entitled him to travel to Norwich. He got out at Diss, and tendered his ticket to Norwich; but the defendants claimed 2s. more for the difference of the fare to Diss. There was no doubt that the defendant knew of the company's arrangements, and intended to deprive them, when he

(k) 24 L. J. 68, M. C.

took his ticket, of the 2s. ; without the payment of which they might have refused to give him a ticket to Diss; but it was held, that, having issued the ticket, they could not prevent the defendant from leaving the train at any point of the transit where it stopped, and that they had no right to demand the additional 2s. at Diss. It will be observed, that, in this case, according to the bye-law, the defendant, before entering the train, was to pay his fare and “be furnished with a ticket, specifying the class of carriage and *distance* for which the fare has been paid;” and to incur a penalty if he should “enter the carriage without having previously paid his fare.” The question was, whether the penalty had been incurred, on a case which showed that the defendant had paid the fare for the longer distance, but not for the shorter distance. It was held, that having paid for the longer distance, he had, by necessary implication, paid for the shorter distance; and that, on the face of the bye-law, and apparently at common law, the company, when they issued the ticket, had no right to demand any larger sum; not even if they had been aware of the defendant’s intention to stop at Diss. Such, at least, appears to have been Lord Campbell’s view; but his Lordship expressly guarded himself from expressing an opinion “as to the power of the company to make special regulations or bye-laws so as to enforce larger fares for shorter distances.”

CHAPTER IX.

ON THE LIABILITIES OF CARRIERS FOR THE NEGLIGENT OR
FELONIOUS ACTS OF THEIR SERVANTS AND OTHER
AGENTS.

CARRIERS are liable generally for the wrongful acts of their servants, according to the rules which govern the relation of master and servant. Carriers are similarly liable for the acts of their agents, according to the rules which govern the relation of principal and agent. The rule in such cases is *respondeat superior*.

The principle of this liability is, that the act of an authorized agent is virtually the act of his principal: *qui facit per alium facit per se*. Therefore, whenever a servant or agent is invested, either expressly or by implication, with an authority to do an act, the law simultaneously transfers it, with its included responsibilities, from the merely instrumental volition and action of the agent, to the motive and directing mind of the principal. Accordingly, the liability of the principal in such a case is exactly commensurate with the authority delegated to the agent. The principal is liable as long as the act of the agent is within the limits of such authority; and he is not liable when the agent is found to have overstepped those limits (*a*). “No master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master; and then the act of the servant is the act of the master” (*b*).

There appears to be, practically, no distinction between

(*a*) *Coleman v. Riches*, 16 C. B. 104; 24 L. J. 125, C. P.; *Sharrod v. North-Western Railway*, 6 Railw. Cas. 239.

(*b*) *Holt, C. J., Middleton v. Fowler*, 1 Salk. 282; *Lyons v. Martin*, 8 Ad. & El. 512.

the liability of a principal for the act of an agent, as distinguished from his liability for the act of a servant (c). And whether the relation be that of principal and agent, or of master and servant, a carrier is equally liable for all damage, caused by the agent or servant, *in the course of his employment*. The modern cases on this branch of the Law of Carriers support this view (d); and the courts have treated the liability of the carrier as depending entirely on the amount of authority which he may be presumed to have intrusted to his representative, whether a servant, or an agent, or a sub-contractor. Thus it has been seen that, where a carrier receives goods to be delivered beyond the limits of his own transit, he is liable, in the character of a principal or master, for their safe delivery, and proper treatment by an ulterior carrier to whom he intrusts them at the terminus of the first transit (e), unless he expressly limit his liability to the terminus of his own transit (f). But where a subsequent carrier, or another person acting for the principal carrier, is neither an agent nor a servant, nor a sub-contractor, over whose conduct the principal carrier has a right to exercise a direct personal control; but holds a distinct character as a separate contractor who, although liable for a breach of contract, is not liable to the direct supervision and personal intervention and control of the first carrier; it would appear that there is not such a privity between the parties as to render the first carrier necessarily liable for the acts of the second carrier. In such a case it seems to be a question of evidence whether the contract is between the first and the second carrier, or

(c) *Sadler v. Henlock*, 4 El. & Bl. 570; 24 L. J. 138, Q. B.; *Haseler v. Lemoyne*, 28 L. J. 103, C. P.

(d) *Coleman v. Riches*, *supra*; cf. *Mitchell v. Crasweller*, 13 C. B. 237; *Lygo v. Newbold*, 9 Exch. 302; *Seymour v. Greenwood*, 9 W. R. 519.

(e) *Muschamp v. Lancaster and*

Preston, &c. Railway, 8 M. & W. 421; *Scothorn v. South Staffordshire Company*, 8 Exch. 347; *supra*, Chapter V.; *Collins v. Bristol and Exeter Railway*, 29 L. J. 185, Exch., H. of L.

(f) *Fowles v. Great Western Railway*, 7 Exch. 699; 22 L. J. 76, Exch.

between the employer and the second carrier. Thus, it is a principle, that where A. employs B. to do work, which B. contracts to do, A. is not liable for damage caused by the negligence of a servant whom B. has employed to do the work; and this doctrine has been held to apply even where A. had a special power to discharge B.'s servant for incompetency (*g*). But it will be a question of evidence whether the relation in such a case be that of principal and agent; or that of separate contractors, who have no general right to dictate or control the manner in which the transaction is to be performed (*h*). If the agent should appear not to be legally such, but a distinct contractor, the principal will not be liable unless the act be unlawful (*i*). Generally the courts do not favour the argument that a person is a contractor for another, and not an agent or servant. Thus, where the defendant employed specially an apparently competent person to clean a drain; and the latter, by his negligence in the course of the employment, injured the plaintiff; the relationship of master and servant was held to exist sufficiently between the defendant and his employee to render the former liable for the negligence of the latter; although the defendant had taken no part in the superintendence of the work. The defendant *might* have superintended; and this privilege appears to constitute the liability in such cases. Lord Campbell, C. J., said: "Whether the defendant is liable or not for the negligence, depends upon whether Pearson is to be considered as his servant at the time. If a domestic servant, in the regular employment of the defendant, had been ordered by the defendant to go and clean the drain, no doubt he would

(*g*) *Reedie v. London and North-Western Railway*, 4 Exch. 256; 20 L. J. 65, Exch.; *Birkett v. Whitehaven Company*, 28 L. J. 348, Exch. As to hackney coach drivers, see *Powles v. Hider*, 25 L. J. 331, Q. B.; *ferryman, Dalzell v. Tyrer*, 28 L. J. 52, Q. B.

(*h*) *Peachey v. Rowland*, 13 C. B. 182; 22 L. J. 81, C. P.; *Wiggett v. Fox*, 25 L. J. 188, Exch.; *Hole v. Sittingbourne Railway*, 30 L. J. 81, Exch.; cf. *supra*, p. 162.

(*i*) *Ellis v. Sheffield, &c. Company*, 2 Ell. & Bl. 767; 23 L. J. 42, Q. B.

have rendered his master liable. Then what difference does it make that, instead of his domestic servant, the defendant employs Pearson, a common labourer, to do the job? It appears clearly that Pearson was doing the work under the defendant's own direction. The defendant might have told him to do it with hard stuff, or he might have superintended the job himself, and given directions until it was completed; and if so, Pearson was his servant *pro hac vice*, and the defendant liable as master" (*k*).

On the other hand, whenever it appears that the work has been done for a principal by a contractor, with whose general management of the transaction the principal had no right to interfere, and which he had no right to control, it is held that the principal is not liable for damage done by the contractor or his servant (*l*).

The liability of carriers, who are not common carriers, for the acts of their agents, corresponds with the doctrine of the preceding cases. Thus it was virtually decided in an earlier case (*m*), that a special carrier for hire is liable for his servant's negligence, in the course of his employment, as soon as the relation of master and servant is established: but that a person who employs such a carrier to perform a distinct duty is not liable for the negligence of the carrier's servant. The liability of a common carrier for the acts of his servants seems to depend on the extent of his character as an insurer.

If a servant, in driving his master's coach, by his negligence runs against and injures another coach, his master is responsible for the injury to the injured coach (*n*). But to create this responsibility there must be distinct evidence

(*k*) *Sadler v. Henlock*, 24 L. J. 138, Q. B.; 4 Ell. & Bl. 570; s. v. *Gayford v. Nicholls*, 9 Exch. 70; 23 L. J. 205, Exch.; *Steil v. South-Eastern Railway*, 16 C. B. 550.

(*l*) *Knight v. Fox*, 5 Exch. 721; *Overton v. Freeman*, 11 C. B. 867; 21 L. J. 52, C. P.; *Peachey v. Row-*

land, 13 C. B. 182; *Wiggett v. Fox*, 25 L. J. 188, Exch.

(*m*) *Milligan v. Wedge*, 12 Ad & Ell. 737, referred to and approved in *Sadler v. Henlock*.

(*n*) *Story*, Bailm. s. 222; *Laugher v. Pointer*, 5 B. & C. 547.

of a relationship of master and servant. Therefore, where the coach belonged to A., and the horses and servant to B., it was held that B. and not A. was responsible for the damage done by the servant, although he wore A.'s livery (*o*).

So if the servant be unskilful in the management of the horses (*p*); or entrusts the reins to a stranger (*q*); or deviates in any way from his strict duty, without acting in open defiance of it; as when he diverges from his proper route (*r*), or injures a passenger while setting him down carelessly (*s*); or even, it is said, when he drives in a totally opposite direction to that in which he has been ordered to drive (*t*); the master has been held liable for consequential damage. But it may be doubted whether the last cited case does not trench on the equally well-established principle, that the master is not liable when the servant acts without orders, or in defiance of his orders; or when he commits an unlawful act which the master is not shown to have authorized (*u*). In such a case the jury ought to be asked whether the master authorized the act, expressly or impliedly, and the verdict will be accordingly (*x*). If the accident be to a servant by the negligence of a fellow servant, or by an accident in the course of the service, the master generally will not be liable unless the negligence can be traced to him personally (*y*).

Generally, when it is sought to hold a carrier liable for

(*o*) *Quarman v. Bennett*, 6 M. & W. 499.

(*p*) *Chandler v. Broughton*, 1 C. & M. 29.

(*q*) *Booth v. Marten*, 7 C. & P. 66.

(*r*) *Joel v. Morrison*, 6 C. & P. 501.

(*s*) *Seymour v. Greenwood*, 9 W. R. 519.

(*t*) *Heath v. Morison*, 2 M. & R. 181.

(*u*) *Joel v. Morrison*, *supra*;

Lyons v. Master, 8 A. & E. 512; *Attorney-General v. Seddon*, 1 C. & J. 220.

(*x*) *Goodman v. Kennell*, 1 M. & P. 241.

(*y*) *Wiggett v. Fox*, 11 Exch. 832; 25 L. J. 188, Exch.; *Vose v. Lancashire and Yorkshire Railway*, 27 L. J. 249, Exch.; *s. v. Roberts v. Smith*, 26 L. J. 319, Exch.; *Sc. Cam. Griffiths v. Gidlow*, 27 L. J. 405, Exch.; *Riley v. Baxendale*, 30 L. J. 87, Exch.

the act of his agent, it must appear, first, that there was an agency created or countenanced by the carrier; and, secondly, that the act was within the scope of the agency.

First, the existence of the agency may be proved by circumstantial facts; and, generally, when it appears that a man has acted as an agent for another, or that such other person has adopted an unauthorized act, a presumption is raised that he was duly authorized; and it will lie on the adverse party to plead and prove a want or excess of authority (*z*).

Thus, in *Syms v. Chaplin* (*a*), it was held, that an agency may well be created constructively by circumstances which show either a direct appointment, or an acquiescence in the acts of a person professing to act as the agent of a party. But the fact must raise a presumption of a general or special agency; and where a contract is in question, there must be reasonable grounds for presuming that the principal had authorized, or intended to ratify, the act of the agent (*b*). So, in such a case, if it appear that the servant, although apparently acting as the agent of the carrier, was really acting independently and on his own account, the carrier will not be liable. Thus, where a carrier's waggoner received a parcel to carry for his own private gain in the defendant's waggon, the defendant was held by Garrow, B., not liable for the loss (*c*). The learned judge held it "clear that if persons be foolish enough to send parcels by a waggoner, for a hire paid to him, which is never intended to find its way into the pocket of the owner of the waggon, then the owner is not liable in case the parcel is lost;" and it appears to have been thought by the learned judge that, in such a case, no authority can be implied to have passed from the carrier to the servant

(*z*) *Smith v. Birmingham Gas Company*, 1 Ad. & Ell. 526.

(*a*) 5 Ad. & Ell. 634.

(*b*) *Lord Ellenborough, Olive v. Eames*, 2 Stark. 182.

(*c*) *Butler v. Basing*, 2 C. & P. 613.

to receive goods on such terms—at least when the customer knowingly participates in the transaction.

Secondly, it must appear that the agent or servant was acting, either within the scope of the authority delegated to him by the principal, or within the course of his ordinary duty. But, as soon as the agency is established, the liability of the master begins for all damage which may occur during its continuance, and within its limits. In such a case the principal is solely liable for the consequences of the negligence of the agent; and the principal is the proper person to be sued (*d*). The agent is not liable. Thus, in *Cavenagh v. Such* (*e*), the defendant was the head porter of an inn; and, in that capacity, it was his duty to receive parcels and deliver them for the proprietor of the inn. It was held, that no action lay against the defendant for a loss by negligence while he was acting in the course of his duty as porter.

There appear, however, to be some doubtful authorities for the position that the principal and agent may be sued jointly for damage caused by the negligence of the latter. This doctrine seems very questionable (*f*).

Where the agent exceeds his authority, he will generally be solely liable for damage arising by his act beyond the limits of his authority as agent, and the principal will be discharged (*g*). In such a case the agent will be considered as carrying on his own account (*h*).

It will be presumed that a duly appointed agent has authority to do all acts within the reasonable scope of his agency; and it appears that this rule is construed strictly and beneficially, for the customer against the carrier. Thus, where it appeared that the superintendent, and also

(*d*) *Williams v. Cranston*, 2 Stark.
82.

C. & P. 383.

(*e*) 1 Price, 328; *Lyons v. Martin*,
8 A. & E. 512.

(*g*) *Collen v. Wright*, Sc. Cam. 27
L. J. 215, Q. B.

(*f*) *Whitmore v. Waterhouse*, 4

(*h*) *Williams v. Cranston*, 2 Stark.
84; *Butler v. Basing*, 2 C. & P. 613.

the director, of a railway had refused to deliver the plaintiff's goods to him, it was held that, as it was the duty of the railway to have officers to determine similar transactions, proof of the refusal to deliver was evidence from which a jury might infer such a negligence and nonfeasance by an agent in the course of his duty as would fix a liability on the railway company; and it was held, that this inference might be drawn without evidence necessarily of the nature and extent of the agent's duty (*i*). The judgment in this case proceeded on the principle, that it is the duty of a railway or other carrier to have a superintending officer or agent to transact the business which the agent in the case was proved to have transacted; and that, therefore, evidence of an act by a person, whose general agency is unimpeached, is evidence of authority in the particular case (*k*).

But where a station master employed medical attendance for injured passengers, it was held, that the company was not bound by his contract, as there was nothing incident to his employment which raised a presumption of constructive authority to bind the company in such a case (*l*).

So, where there is distinct evidence that the agent exceeded his authority, the carrier will not be bound. Thus, in *Slim v. The Great Northern Railway Company* (*m*), by the course of business, which was known to the plaintiff, the defendants carried goods only according to the terms of a written contract, by which the carrier was freed from liability. The plaintiff, without entering into such written contract, delivered goods to a servant of the defendants, who promised to take care of them. The defendants were held not liable for subsequent damage, on the ground, first, that the servant had not absolutely

(*i*) *Taff Vale Railway Company v. Giles*, 2 Ell. & Bl. 823; 23 L. J. 43, Q. B.

(*k*) Cf. *Eastern Counties Railway v. Broom*, Sc. Cam. 6 Exch. 314; 20 L. J. 196, Exch.

(*l*) *Cox v. Midland Railway*, 3 Exch. 268; 18 L. J. 65, Exch.; s. v. *Goff v. Great Northern Railway*, 30 L. J. 148, Q. B.

(*m*) 14 C. B. 647; 23 L. J. 166, C. P.

contracted with the plaintiff; and, secondly, that if he had so contracted, he had no authority to contract, especially when the want of such authority was known to the plaintiff. The distinction between this case and the preceding one appears to be, that, when the circumstances of a case establish a general agency, a jury may infer that it contains a special authority which reasonably belongs to the agency; but where the facts show that a customer deals with an agent on terms which, he ought to know, exceed the agent's authority, there is no evidence to support the presumption of a special agency. In such cases it appears, that an actual or constructive knowledge in a customer that an agent is exceeding his authority is essential to free the carrier from liability.

But there are cases very similar to *Slim v. The Great Northern Railway Company*, in which, notwithstanding a customer's knowledge of the written, or otherwise ascertained, regulations of a carrier's course of business, an authorized agent, in the course of his ordinary duty, may, under special circumstances, so far dispense with such regulations as to render his principal liable. At least it would appear that such special circumstances are evidence from which a jury may infer an authority to the agent to bind the principal, notwithstanding the customer's conscious participation in the breach of the regulations. But in such a case, much appears to depend on the departure from the regulations being in accordance with a course of practice which the carrier has suffered to grow up at variance with such regulations. Thus, in *Richards v. London and South Coast Railway (n)*, it appears to have been thought that the duty of the carrier, in delivering luggage to passengers, was satisfied by a delivery on the platform; but that, if the course of business was to deliver into carriages, the carrier's liability continued until the luggage was placed in carriages. Williams, J., said: "I do not mean to give an opinion whether the defendants were

(n) 7 C. B. 839; 18 L. J. 251, C. P., and *supra*, p. 42.

obliged to do more than deliver the luggage on the platform. But I think, if they oblige passengers by allowing their servants to carry luggage to coaches, their liability continues." The same rule holds where the practice exists, although the carrier's servant be acting out of his own department, and although the customer do not part with the manual possession of goods until after the virtual termination of the transit. Thus, in *Butcher v. London and South-Western Railway* (*o*), the passenger retained the goods during the transit, and delivered them on the arrival of the train to a lamp-cleaner, who offered to put them in a cab, and who was a servant of the company, but not a regular porter; and the defendants were held liable. A still stronger illustration of the principle is found in *The Great Western Railway v. Goodman* (*p*), where a by-law which was specially binding on the public, and by which the carrier was not to be liable for goods which were not booked, was held not to take away the carrier's liability for goods which his servant received to be carried without being booked. So, in *The Great Northern Railway Company v. Harrison* (*q*), the carrier was held liable for damage to a passenger who was travelling with a knowledge that he was infringing the regulations of the company; but who was found to have been admitted into the train by an agent, under an irregular course of practice, by which such persons as the plaintiff were suffered to travel. It will be observed that in each of these cases the whole question was one of agency, and that the jury were permitted only to infer a special and extended authority from the acquiescence of the carrier in a course of practice which was at variance with the actual authority delegated to the agent. They are cases, therefore, in which the excess of authority, although not in the course of duty, was held to have been adopted by the principal.

(*o*) 16 C. B. 13; 24 L. J. 137, (*q*) 10 Exch. 376; 23 L. J. 308,
C. P. Exch.

(*p*) 12 C. B. 313.

It is difficult to draw the line between those acts of negligence in a servant, in the course of duty, for which a principal is liable, and those wilful acts, for which the carrier is not liable. If the damage be caused by the servant while he is apparently and virtually, although erroneously, discharging the duty entrusted to him, the master is liable. But if there be a clear violation of an express order or regulation, and the act be not merely an excess of authority and a deviation from a positive duty, but also a clear infraction of a customary and definite course of business; there will be evidence from which a jury may infer such a wilful breach of duty as will exculpate a carrier by satisfying them that the act is of that peculiar and wilful character, intermediate between negligence and felony, for which the servant is solely and personally responsible (*r*).

Generally, it is the disposition of the court to hold a carrier bound by any act of an agent who appears to be acting in the course of a duty. Thus, in *Wingfield v. Packington* (*s*), Lord Tenterden held, that a carrier could not demand a higher charge than the clerk had agreed to take, although the clerk had exceeded his authority in agreeing to take so low a charge.

Where the carrier contracts specially that he will not be liable for any risk whatever, he will not be liable for damage caused during the transit by the gross or culpable negligence of his agent or servant (*t*). So, where the requirements of the Carriers' Act have not been observed by the customer, the carrier, it appears, is not liable even for the gross negligence of his agent or servant (*u*).

The liability of Carriers for the felonious acts of their Servants.

The 8th section of the Carriers' Act provides that:

(*r*) *Infra*.

179, C. P.; *supra*, Chapter VIII.

(*s*) 2 C. & P. 599.

(*u*) *Hinton v. Dibbin*, 2 Q. B.

(*t*) *Austin v. Manchester, &c. Railway*, 10 C. B. 454; 21 L. J.

646, and *supra*, p. 151.

“ Nothing in this act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his, her, or their own personal neglect or misconduct.”

At common law it appears that a common carrier, in his character of insurer, is liable absolutely for loss or damage caused by the felonious act of his agent or servant. No other doctrine is apparently reconcilable with the fundamental liabilities of common carriers (*y*). But it is equally true that this doctrine has been rendered somewhat doubtful by recent cases. In *Machu v. London and South-Western Railway Company* (*z*), the declaration was for lost goods above the value of 10*l*. The plea set up the Carriers' Act and non-disclosure of value; and the replication stated merely that the goods were *feloniously* stolen by the servant of the defendants. The substantial question before the court was, whether the servant of a sub-contractor could be treated as a servant of the defendants, and it was decided that he could. But the court appear also to have taken it for granted that a carrier is liable in all cases for the felony of his servant. Pollock, C. B., said: “ The object of the statute was, undoubtedly, to give protection to carriers in cases of small parcels of great value being delivered to carry; and the legislature has said that they shall not be liable for loss unless an extra price by way of insurance is paid; but then, by way of protection to the public, the legislature has also said that, whether insured or not, the carrier shall still be liable if the loss has occurred through the felonious act of a coachman, guard, book-keeper, porter, or other servant in his employ.” Rolfe, B., said: “ It is

(*y*) Cf. *Phillips v. Clark*, 2 C. B., (*z*) 2 Exch. 415; 17 L. J. 271,
N. S. 156; 26 L. J. 168, C. P. Exch.

clear that, independently of the statute, the defendants would be liable for the loss as a breach of the duty they had undertaken to perform." The language of Parke, B., is still stronger and more explicit: "Suppose, in the present case, the bale of silk, instead of having been stolen, had been injured in consequence of the careless treatment of it by Johnson . . . can any one doubt that if the goods had been duly insured, the defendants would have been liable for the damage? They would have been liable upon the ground that Johnson was their servant."

Here it seems to have been assumed that both at common law and under the Carriers' Act, 1 Will. 4, c. 68, a common carrier is liable for the larceny of his servant. But in *Butt v. The Great Western Railway Company* (a), the declaration was against the defendants as common carriers, and claimed the value of a truss of silk of which the plaintiff alleged that he had been deprived by the *gross negligence* and the *felonious acts* of the defendants' servant. The plea set up a non-disclosure of value according to the requisitions of a special notice and contract: and a new assignment repeated the plaintiff's claim on the ground that the loss was caused by the *felonious* act of the defendants' servant, without any averment that the loss was also caused by the *gross negligence* of the defendants. On demurrer, the substantial question was, whether the defendants were liable for the mere felony of their servant; or whether, in order to render them liable, there must not also have been gross or culpable negligence on their part. Maule, J., and Cresswell, J., appear to have thought, on the authority of *Finucane v. Small* (b), that a carrier, like an ordinary bailee for hire, is not liable for loss or damage by the felony of his servant, unless the carrier have also been guilty of "positive negligence." Maule, J., said: "*Finucane v. Small* shows that felony does not of itself prove gross negligence;" and in reference to the case under

(a) 11 C. B. 140; 20 L. J. 241, C. P.

(b) 1 Esp. 315.

consideration : "It is necessary to show felony to get rid of the excuse under the Carriers' Act; and gross negligence to make the carrier liable for felony." Cresswell, J., said : "The statute takes away the liability of carriers as to gross negligence in respect of the excepted articles, but has reserved it as to felony; but it does not make the remedy, in case of felony, larger than at common law. If, therefore, it was necessary at common law to prove gross negligence as well as felony, it must still be so." Jervis, C. J., appears to have held the same opinion less strongly. His Lordship said : "It seems that there may be a possible state of circumstances in which a carrier is not liable for the felonious acts of his servants, unless there be some act of the carrier himself tending to the loss." Ultimately the plaintiff had leave to amend his new assignment "by replying a loss through the gross negligence of the defendants, on the ground that the replication of felony alone is not sufficient; otherwise judgment for the defendants."

It is to be observed, that in this case the question of a common carrier's liability for loss by the felony of his servant was not raised directly; but that the court appeared to doubt the doctrine, which has elsewhere been assumed to be true (*c*), that at common law the common carrier is liable in such a case, by virtue of his character as an insurer. But the actual question, as it has been stated by the Bench subsequently (*d*), was as to the liability of the carrier, when the value of goods has not been disclosed by the sender, in accordance with the terms of a special contract, by which the carrier is exempt from responsibility for loss or injury in the event of non-disclosure; and not as to his responsibility, when he claims exemption, because the value has not been disclosed, in accordance with the requisition of the Carriers' Act. This state of the

(*c*) *Phillips v. Clark*, 2 C. B., N. S. C. P.; *Metcalf v. London, Brighton and South Coast Railway*, 4 C. B., 156; 26 L. J. 168, C. P.

(*d*) *Great Western Railway v. Rimmell*, 18 C. B. 575; 27 L. J. 201, N. S. 311; 27 L. J. 205, C. P.

controversy must be noticed carefully: as the language of the judges, in *Butt v. Great Western Railway*, seemed to imply that they treated this case as one under the Carriers' Act; and as such it was considered accordingly in the first edition of this treatise.

In *Great Western Railway v. Rimmell* (*e*), the case arose under the Carriers' Act; and the defence was the non-disclosure of value, according to the requirements of the statute. The reply was, that the goods had been stolen by the servants of the defendants; but of this allegation there was no proof: and the court held that, therefore, judgment of nonsuit must be entered. The county court judge had told the jury that the plaintiff could not recover unless the negligence of the defendants had contributed to the felony. But this was held to be a misdirection. Jervis, C. J., said: "When the defendants rely upon the statute for their defence, negligence has nothing to do with the question. The rule is this: under the statute, felony by a servant is a sufficient answer to the defence set up by the carrier; and negligence has no effect one way or the other. When the defence is independent of the statute, negligence alone is a sufficient answer. Under the statute, felony is an answer; under the carriers' notice, negligence is an answer. That is the result of the decision in *Butt v. Great Western Railway*. We only decided, that felony by the defendants' servant, without negligence on their part, was not a good answer to a defence, that the value of the goods was not declared according to the notice."

This case was followed by *Metcalf v. London, Brighton and South Coast Railway* (*f*). There, also, the case was under the Carriers' Act; the defence, that the goods were above the value of 10*l.*, and that it had not been declared; replication, a loss by the felonious acts of the defendants' servants. On demurrer, the replication was held good, and judgment given for the plaintiff.

On a careful consideration of the preceding cases, the

(*e*) *Supra*, p. 179.

(*f*) *Supra*, p. 179.

following propositions of law may be submitted as probably correct.

1. A common carrier, at common law, is responsible in his character of insurer for losses by the larceny of his servant.

2. A common carrier may exempt himself by special contract from liability for losses by the larceny of his servant. In this case, the carrier will not be liable, except when his negligence has contributed to the larceny (*g*): and there seems to be no reason why by apt words he should not exempt himself altogether from liability, even for gross negligence in such a case (*h*).

3. A special carrier for hire, like an ordinary bailee for hire, is not liable for the larceny of his servant without negligence; nor even then, according to the view in the last proposition, when he has stipulated properly, that he will not be liable for any kind of negligence (*i*).

4. Under the 8th section of the Carriers' Act it is settled, that, when the goods are such as are described in the first section, above the value of 10*l.*, and the value undisclosed, the carrier is liable absolutely for the larceny of his servant: and it is immaterial whether the carrier have been guilty of negligence or not. This doctrine appears to apply to all carriers who use the statutory notice: and it follows, that if they wish to limit their liability, they can do so only by special contract (*k*).

To complete this subject, it is necessary to anticipate a later chapter, and to state briefly the apparent liability of railway and canal carriers under the 17 & 18 Vict. c. 31. This liability appears to range itself, according to circumstances, under one or other of the above four classes; with the important exception, that, under sect. 7, and the cases

(*g*) *Butt v. Great Western Railway*, supra, p. 178.

(*h*) *Supra*, p. 149.

(*i*) Cf. *Angell on Carriers*, pp. 47

& 48, n. (3rd edit.)

(*k*) *Great Western Railway v. Rimmell*, supra, p. 180.

which will be noticed later, no condition nor contract will be held good, which professes to exempt the carrier from liability for gross or culpable negligence.

When a plaintiff relies on the larceny of a carrier's servant, he must give distinct evidence that a larceny has been committed. "A mere suspicion that a loss has arisen by felony is not sufficient" (*l*); and the plaintiff cannot recover, unless he give evidence sufficient to convict the servant of felony (*m*).

A carrier's liability for the felony of his agent's servant is precisely commensurate with his liability for the felony of his own servant. Where the carrier contracted to deliver at the door of the consignee; and the carrier, at the terminus of his own transit, delivered over the goods to a sub-contractor, by whose servant they were stolen during the subsequent transit; the servant of the sub-contractor was held to be sufficiently a servant of the carrier, so as to affect the latter with a liability for the felony (*n*).

Where there is any evidence, however slight, of a felony having been committed by a carrier's servant, it should be left to the jury to say whether a felony has been committed; and when this has been done, a new trial will not be granted, on the ground that the verdict is not supported by the evidence (*o*).

(*l*) Per Cresswell, J., in *Great Western Railway v. Rimmell*, supra, p. 180.

(*m*) *Metcalf v. London, Brighton, &c., Railway*, supra, p. 179.

(*n*) *Machu v. London and South-Western Railway*, supra, p. 177.

(*o*) *Boyce v. Chapman*, 2 Bing. N. C. 222.

CHAPTER X.

THE RIGHTS OF CARRIERS.

*The end of responsibility—What will excuse non-delivery—
Adverse title—Stoppage in transitu—Right of lien—
Of remuneration.*

THE rights of carriers are, for the most part, co-extensive with their duties and liabilities. As such they have been noticed, more or less distinctly, in the preceding chapters of this work. In the present chapter they will be recapitulated briefly, or enunciated at length, according as they assume the form of repetitions, or of doctrines stated for the first time.

It is plain, from the early chapters of this treatise, that as a carrier incurs no liability before goods have been delivered to him, or before he has contracted to carry them; so no liability can attach to him for damage which may happen to them after he has delivered them; nor where the contract between him and his employer has been otherwise performed, rescinded, countermanded, or qualified by consent, or a subsequent contract. He will not be liable before the goods have been actually, or constructively, delivered to him; nor after they have been actually, or constructively, delivered by him. Whether the circumstances amount to a delivery under either alternative will be wholly a question for a jury (*a*). Generally, a *bonâ fide* tender will be a good delivery (*b*).

A common carrier is bound to carry only such goods as

(*a*) *Quiggin v. Duff*, 1 M. & W. 174. You. 129; *Crouch v. Great Western Railway*, 3 H. & N. 183; 27

(*b*) *Storr v. Crowley*, 1 M'Cle. & L. J. 345, Exch., Sc. Cam.

he has professed publicly to carry (*c*); and he may at any time retract and give public notice that he will no longer carry a particular kind of goods (*d*). It appears also, that, although *primâ facie* he is an insurer, he may at common law, and at any time, limit his liability, either partially or wholly, by contracting expressly with his employer; but he cannot force such a contract on his employer; and if the latter refuse to enter into it, and the goods are such as the carrier is in the habit of carrying, he will be bound to carry on the terms of his common law liability (*e*). Similarly he will be free from liability, if the requirements of the Carriers' Act have not been observed (*f*); or where goods are lost or damaged by the act of God or the king's enemies, but not where the loss or damage is caused by ordinary human agency, or by inevitable accident (*g*). As a carrier of passengers he is not an insurer (*h*), and he is liable only in the event of negligence; and generally not even for negligence, if the passenger's own negligence contribute to the damage (*i*). Neither will he be liable where the damage is caused by the employer's fraud (*k*).

A carrier who is not a common carrier, and who does not expressly insure or warrant the safety of goods, has the same immunities as common carriers, and also the additional immunity from liability for inevitable accident. Thus, he is not liable where goods are destroyed by fire or unavoidable accidents of the road, unless he be found to have caused or contributed to the loss by his *negligence* (*l*).

Where the contract to carry is avoided by operation of law, the carrier will be excused; but where there is merely a temporary legal obstruction, by which the carrier is pre-

(*c*) *Johnson v. Midland Railway*,
4 Exch. 367; *supra*, Chapter IV., p.
34.

(*d*) *Ibid.*

(*e*) *Carr v. Lancashire, &c., Rail-
way*, 7 Exch. 707; *supra*, Chapter
VII., p. 95.

(*f*) *Supra*, Chapters VII.

(*g*) *Supra*, Chapter VIII.

(*h*) *Supra*, Chapter III.

(*i*) *Martin v. Great Northern Rail-
way*, 16 C. B. 179; 24 L. J. 209, C. P.

(*k*) *Supra*, Chapter VIII.

(*l*) *Supra*, Chapter VIII., p. 127.

vented from fulfilling his contract, such an obstruction will not justify a total non-fulfilment; but the carrier will be justified in not fulfilling during the continuance of the obstruction, and will be bound to fulfil within a reasonable time after the removal of the obstruction. Thus, where a contract to carry was obstructed by an embargo on the vessel by an order in council, it was held, that the performance of the contract was only suspended while the order remained in force; and that the carrier was liable in damages for non-performance within a reasonable time after the embargo was taken off (*m*). But where the carrier relies on the intervention of a legal impediment to excuse him, it must appear clearly in his plea that the impediment was of a strictly legal character; and, accordingly, where a plea alleges an obstruction by officers of the law, it must be averred and appear that they were duly constituted, and had authority to act (*n*). If it should appear that they acted without authority, the carrier will be liable to the consignee for the delay, and will have his remedy over against the officers (*o*).

Where the performance of the contract is physically impossible, it would seem that generally the carrier will be bound to pay damages for the non-performance of it (*p*).

Where a loss or damage is traceable, wholly or partially, to the negligence of the employer, the carrier will not be liable. This doctrine is illustrated by a case in which the defendants were sued, as carriers, for injuries sustained by a passenger, who, in endeavouring to cross the railway of the defendants by the usual path, in order to enter the train, missed the way, and received the damage by falling against a switch handle. There was evidence that the station at the time was defectively lighted; and Maule, J.,

(*m*) *Hadley v. Clarke*, 8 T. R. 259.

(*n*) *Evans v. Hutton*, 5 Scott, N. R. 670.

(*o*) *Gosling v. Higgins*, 1 Camp. 451.

(*p*) *Brown v. Royal Insurance Society*, 28 L. J. 275, Q. B.; *Hall v. Wright*, cf. *Sc. Cam.*, E. B. & E. 765; 29 L. J. 43, Q. B.; cf. *supra*, pp. 76 and 112.

left it to the jury to say whether the damage was caused by the careless and insufficient management of the station generally; or, whether, as the defendants contended, it was owing *entirely* to the plaintiff's own negligence. The verdict was for the plaintiff; and a rule for a new trial, on the ground of misdirection, was discharged. Jervis, C. J., said: "Treating this as an action founded on negligence, I admit that the plaintiff cannot recover, if by his own negligence he contributed to the injury of which he complains;" and added, "that in such cases there are substantially three questions to be determined: First (and this in reality includes the third), did the injury result solely from the defendants' negligence? Secondly, was the injury occasioned by the plaintiff's negligence, the defendants being free from all blame? And thirdly, did the plaintiff contribute to the injury by his own negligence? If the first question were answered in the affirmative the plaintiff would be entitled to succeed; if the second or third were answered in the affirmative the defendant would be entitled to succeed. Strictly speaking, all three questions ought to be left to the jury." Cresswell, J., said: "I assume that although the jury rightly found that there was negligence on the part of the defendant, yet if it had been proved that the plaintiff, by the exercise of *reasonable caution*, could have avoided the accident, the defendants would have been entitled to the verdict." Maule, J., said: "There were two propositions only contended for; the first, by the plaintiff, that the defendants alone were negligent, and were therefore liable; the second, by the defendants, that the plaintiff alone was negligent, and that they, therefore, were not liable. Both those propositions were true and good law; but it is now said, that it is also true that if there was negligence on both sides the plaintiff was not entitled to succeed. This certainly is true also" (q).

It appears from this case, that it is the decided opinion of the Court of Common Pleas that a carrier is not liable

(q) *Martin v. Great Northern Railway*, 16 C. B. 179; 24 L. J. 209, C. P.

for damage which is caused either wholly or *partially* by the employer's negligence. But this doctrine, it is apprehended, must be taken as subject to the restrictions laid down in *Butterfield v. Forrester* (*r*), and *Boridge v. Grand Junction Railway* (*s*); which cases have established the principle that the carrier will be liable, notwithstanding that the employer has caused or contributed to the damage, if the carrier might, by the exercise of ordinary care, have avoided the consequences of the employer's negligence (*t*). The authorities were given in the same chapter for the doctrine, that a carrier will not be liable where the owner of goods does not part with the possession of goods during the transit; or where he resumes possession before its termination; or where he interferes imperatively in any way with the stowage or disposition of goods. But a carrier is not bound to comply with an unreasonable countermand, or an unreasonable interference with the disposition of goods during the transit (*r*).

When the consignee of goods cannot be found, or where he refuses to accept the goods, or where there is any reasonable doubt as to the title of the person who claims as consignee, there appears to be no doubt not only that the carrier is justified in not delivering, but that it is his duty not to deliver under such circumstances. In such a case the carrier has a right to retain the goods as a warehouseman until he receives further instructions from the consignor, who will be liable for the additional trouble and expense thus caused to the carrier. This is clearly the result of *Stephenson v. Hart* (*s*), where the carrier was held liable to the consignor for negligence in delivering to a wrong consignee.

In all such cases the prudent course for the carrier to take will be probably to warehouse the goods, to com-

(*r*) 11 East, 60.

(*s*) 3 M. & W. 248.

(*t*) *Supra*, p. 156.

(*r*) *Scothorn v. South Staffordshire*

Railway, 8 Exch. 341; 22 L. J. 121, Exch.; and see *supra*, p. 162.

(*s*) 4 Bing. 476; *supra*, p. 48.

municate with the consignor, and to await his instructions; but there is no rule of law by which he is bound to act thus; and he is required only to take such a course as a jury may think to be reasonable under the circumstances of each case. Thus, where the consignee of a cask of gin refused to receive it; and the carrier, instead of giving notice of the refusal to the consignor, kept it for three months in a warehouse, at the end of which time it was found that part had escaped by leakage: it was held, that the judge was right in directing the jury to consider whether the defendants had taken a reasonable course under the circumstances, and whether they had been negligent in the custody; and the court refused to disturb a verdict for the defendants in an action against them for the loss by the leakage (*t*).

If the consignee refuse to receive the goods at the time when the carrier tenders them to him; or if the carrier refuse to deliver because the consignee refuses to pay the charge of carriage; the carrier ought not to return the goods at once to the consignor or place of consignment; but should keep them for a reasonable time, and in a reasonable place, to give the consignee an opportunity of coming to terms with the carrier. Where goods were consigned to the plaintiff at Plymouth, who refused to pay the carriage on the day when they were tendered, and the carrier then refused to deliver; and on the following day sent them back to the place whence they were consigned to him: and later on the same following day the plaintiff tendered the price of carriage under protest: the carrier was held to be liable for the loss of the goods on the return journey, as the jury found that they had been sent back before the plaintiff had had a reasonable time for demanding and receiving them (*u*).

(*t*) *Hudson v. Baxendale*, 2 H. & N. 575; 27 L. J. 93, Exch.

Exch.; aff. Sc. Cam. 27 L. J. 345, Exch.; cf. *Giles v. Taff Vale Com-*

(*u*) *Crouch v. Great Western Railway*, 2 H. & N. 491; 26 L. J. 418,

pany, 2 Ell. & Bl. 822.

After the carrier has kept the goods a reasonable time, if the consignee still refuse to accept, the carrier may either return the goods to the consignor, and sue him for the carriage; or may retain them as a lien for the price of carriage (*x*).

Adverse Title.

A carrier may often be placed in a difficult position when goods, which he has received to carry for an employer, are claimed by a third person. Such a claim may be either one of absolute ownership by a person who claims them as his own; or by one who claims a lien, as where goods are stopped *in transitu* on the insolvency of the consignee; or it may be more strictly by operation of law, as where they are pursued by a landlord under a distress, or a sheriff under a *fi. fa.* In such a case the prudent course for a carrier will be to avail himself of the Interpleader Act, 1 & 2 Will. 4, c. 58. The general doctrine of adverse title is recondite; but the following principles appear to be established. "An agent must account to his principal, and cannot set up the *jus tertii* in an action by his principal against him (*y*).” And therefore a carrier, like an ordinary bailee, cannot dispute his bailor's title. He holds for his employer; and if a third person set up a claim to them, the carrier will admit it at his peril. The case is similar to one in which goods, after having been sold by the defendant to the plaintiff, were claimed by a third person, and it was held, that trover lay for them (*z*). In this case there was no distinct evidence of the ownership; and the ground of the decision was the general principle that the defendant had attorned to the plaintiff, had recognized his title, and could not therefore plead an adverse claim. So (*a*), where the defendant had admitted goods to belong to the plaintiff, it was held, that he was estopped from pleading and

(*x*) Per Maule, J., *Crouch v. Great Western Railway*, 26 L. J. 420, Exch.

(*y*) *Alderson, J.*, 9 Taunt. 383.

(*z*) *Kieran v. Sandars*, 6 Ad. & Ell. 515.

(*a*) *Gosling v. Birnie*, 7 Bing. 339.

showing that they belonged to, and had been claimed by, a third person. So Gould, J., and Lord Kenyon are reported to have held, that if a carrier receive goods he cannot set up the title of a third person against his consignor or consignee (*b*). And although this doctrine is opposed to *Ogle v. Atkinson* (*c*), where Gibbs, C. J., held, that such a defence might be established; the better view seems to be, as stated above, that, as between the carrier and his employers, such a defence is inadmissible (*d*).

In such cases a demand by the owner, and a refusal by the bailee to deliver up the goods within a reasonable time, is sufficient evidence of a conversion by the latter (*e*).

But where the goods actually belong to a third person, and the carrier has notice of the fact, he will deliver them at his peril to his bailor; and in an action against him by such third person for the goods, he will be liable if his bailor prove to have had no title. Thus, in *Wilson v. Anderton* (*f*), where the defendant detained goods from the real owner, upon an unfounded claim of lien, which had been set up by his own immediate bailor, he was held liable in trover. Lord Tenterden, C. J., said: "A bailee can never be in a better situation than the bailor. If the bailor has no title, the bailee can have none, for the bailor can give no better title than he has. The right to the property may be tried in an action against the bailee; and a refusal like that stated in the case has always been considered evidence of a conversion. The situation of a bailee is not without remedy. He is not bound to ascertain who has the right. He may file a bill of interpleader in the court of equity. [His Lordship was speaking before the Interpleader Act.] But a bailee who forbears to adopt that mode of proceeding, and makes himself a party by retaining the goods for the bailor, must stand or fall by his title."

(*b*) *Laclough v. Towle*, 3 Esp. 115.

(*c*) 5 Taunt. 763.

(*d*) Cf. *Jeffries v. Great Western Railway*, 25 L. J. 107, Q. B.

(*e*) *Burroughes v. Bayne*, 29 L. J. 185, Exch.

(*f*) 1 B. & Ad. 450.

Hence a common carrier, who has received goods for carriage from a wrongful holder, may always deliver them up to the rightful owner; and the fact that he has actually done so will be a defence in an action for the conversion, against him, by the wrongful holder; for a common carrier is bound to receive goods for carriage, even from a wrongful holder (*g*). The same doctrine appears to hold in the case of carriers for hire, who are not common carriers; and their only contract, in the absence of an express stipulation to the contrary, appears to be, that they will dispose of the goods according to the bailor's directions, unless the goods turn out to be the property of another (*h*).

If a carrier receive goods from a wrongful owner, and deliver them according to his direction, before he knows of the lawful owner, he will clearly not be liable to the latter. Neither will he be liable, apparently, if he deliver according to the direction of the wrongful owner, and with constructive, or even an actual, knowledge of the adverse claim, unless under circumstances of fraud. An agent cannot be converted by notice from a stranger into an implied trustee for such stranger (*i*). Thus, where an auctioneer sold for a person in insolvent circumstances, with notice from a creditor of the insolvency, he was held not liable to the assignees for proceeds of the sale which he had paid over to the insolvent (*j*). It appears from this case that the bailee or agent will not be liable unless the goods be in his hands: "the mere intermediate hand is not responsible unless caught with the goods:" (per Alderson, B.)

There is a difficulty in reconciling this last case with *Wilson v. Anderton* (*k*). On the one hand, it appears that a bailee cannot have a better title than his bailor; on the other, that he cannot be made an implied trustee for a

(*g*) *Sheridan v. New Quay Company*, 4 C. B., N. S. 618; 28 L. J. 58, C. P.

(*h*) *Cheesman v. Exall*, 6 Exch. 341; 20 L. J. 209, Exch.

(*i*) *Alderson, J., Hardman v. Willcock*, 9 Taunt. 383.

(*j*) *White v. Bartlett*, 9 Taunt. 378.

(*k*) *Supra*, p. 190.

stranger by notice. But *White v. Bartlett* proceeded on the principle that, as between the bailee and the assigns of the bailor, the discharge given by a bailor is a good answer to an action by his assigns against the bailee. The result of the cases appears to be, that in cases of disputed title to bailed goods, the carrier may be held liable to both the bailor and a third person in whom the ownership is. In an action by his bailor he cannot set up an ownership in a third person; and in an action by a third person, who is also the lawful owner, he cannot set up the bailment from his own wrongful bailor. The only safe course for the carrier is to avail himself of the Interpleader Act, 1 & 2 Will. 4, c. 58, by which it is enacted, that "in any action of assumpsit, debt, detinue or trover," a defendant, "by application being made after declaration and before plea, by affidavit or otherwise, showing that he does not claim any interest in the subject matter of the suit, but that the right thereto is claimed, or supposed to belong to some third party, who has sued or is expected to sue for the same," may obtain an order by the court, or at chambers, to compel such third person to appear and defend the action or relinquish his claim. The court or a judge may grant an interpleader order "although the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of each other" (1): and "upon the hearing of any rule or order calling upon persons to appear and state the nature and particulars of their claim, it shall be lawful for the court or a judge, whenever from the smallness of the amount in dispute, or of the value of the goods seized, it shall appear to him or them desirable or right so to do, at the request of either party, to dispose of the merits of the respective claims of such parties, and to determine the same in a summary manner, upon such terms as they or he shall think fit to impose; and to make such other rules and orders therein as to

(1) 23 & 24 Vict. c. 126, s. 12.

costs and all other matters as may be just" (*m*). When this question is one of law, and not of fact, the judge may either decide it himself, or direct a special case for the court (*n*); and the judgment, whether of the single judge or of the court, is conclusive as to all parties and third persons (*o*). In order to maintain such an application the carrier must, at the time, have the disputed property in his possession (*p*); and an action must have been actually pending against him by a claimant (*q*).

Stoppage in transitu.

Under the head of adverse title it may be desirable to refer to the right which an unpaid vendor of goods has to stop them, on the transit to the vendee, at any time before they reach the possession of the latter. The position of the carrier in such a case will be the same as it is in any other case of adverse title.

The general doctrine on this branch of law will be found in the leading case of *Lickbarrow v. Mäson* (*r*), and the learned notes in the last reference. It is there said: "Stoppage *in transitu*, as its name imports, can only take place while the goods are on the way; if they once arrive at the termination of their journey, and come into the actual or constructive possession of the consignee, there is an end of the vendor's right over them. And therefore, in most of the cases, the dispute has been, whether the goods had or had not arrived at the termination of their journey. The rule to be collected from all the cases is, that goods are *in transitu* as long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee; and also so long as they remain in any place of deposit connected with their transmission. But

(*m*) Ibid. s. 14.

(*n*) Ibid. s. 15.

(*o*) Ibid. s. 16.

(*p*) *Scott v. Lewis*, 2 C. M. & R.
289.

(*q*) *Allen v. Gilby*, 3 Dowl. P. C.
143; *Lawrence v. Matthews*, 5 Dowl.
P. C. 149.

(*r*) 2 T. R. 63; 1 Smith's Lead.
Cas. 646, 4th ed.

that if, after their arrival at their place of destination, they be warehoused with the carrier, whose store the vendee uses as his own; or even if they be warehoused with the vendor himself, and rent be paid to him for them, that puts an end to the right to stop *in transitu* (s)."

So in *Whitehead v. Anderson* (t), Parke, B., in delivering the judgment of the court, said: "The law is clearly settled that the unpaid vendor has a right to retake the goods before they have arrived at the destination originally contemplated by the purchaser, unless in the meantime they have come to the actual or constructive possession of the vendee. If the vendee take them out of the possession of the carrier into his own before their arrival, with or without the consent of the carrier, there seems to be no doubt that the transit would be at an end; though, in the case of the absence of the carrier's consent, it may be a wrong to him for which he would have a right of action." His Lordship then gave the following account of the doctrine of constructive possession in such a case: "A case of constructive possession is where the carrier enters expressly, or by implication, into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee or his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new or further order to be given to him. It appears to us to be very doubtful whether an act of marking or taking samples or the like, without any removal from the possession of the carrier, so as though done with the intention to take possession, would amount to a constructive possession, unless accompanied with such circumstances as to denote that the carrier was intended to keep, and assented to keep, the goods in the nature of an agent for custody" (u).

From these general principles it will be comparatively

(s) *Hurry v. Mangles*, 1 Camp. 452.

(u) Cf. *Foster v. Frampton*, 6 B. & C. 107.

(t) 9 M. & W. 532.

easy for a carrier to determine when he may safely deliver to a consignee goods which a consignor reclaims on a right to stop *in transitu*. It will also be remembered that stoppage *in transitu* is not a resumption of ownership, but a claim of lien; and, therefore, where the lien is unfounded because the stoppage is illegal, the carrier will be within the express doctrine of *Wilson v. Anderton (v)*, if he re-deliver them to the consignor.

The carrier will be entitled to express notice from the consignor before he will be held liable for not stopping goods *in transitu (x)*.

Right of Lien.

A carrier's right of lien is analogous to a consignor's right of stoppage *in transitu*. In both cases the right only of possession remains with the carrier, or reverts to the consignor. The property and ownership are in the consignee or vendee; but are suspended by the intervention of the carrier's, or consignor's, equitable claim.

Accordingly, in *Lickbarrow v. Mason (y)*, Buller, J., thus stated the general principle of both rights: "Neither of them are founded on property; but they necessarily suppose the property to be in some other person, and not in him who sets up either of these rights. They are qualified rights, which, in given cases, may be exercised over the property of another; and it is a contradiction in terms to say a man has a lien upon his own goods, or a right to stop his own goods *in transitu*. If the goods be his, he has a right to the possession of them, whether they be *in transitu* or not; he has a right to sell or dispose of them as he pleases, without the option of any other person; but he who has a lien only on goods has no right so to do; he can only retain them till the original price be paid. . . . Liens in law exist only in cases where the party entitled to

(v) *Supra*, p. 190.

(y) 6 East, 21; *Rushforth v. Had-*

(x) *Whitehead v. Anderson*, 9 M. field, 6 East, 522.

& W. 518.

them has the possession of the goods; and if he once part with the possession, after the lien attaches, the lien is gone. . . . It is known and unquestionable law that if a carrier, a farrier, tailor or innkeeper deliver up the goods, the lien is gone."

Whether the claim of lien be that of a warehouseman, a wharfinger, or a carrier, its validity must depend on reasonable and ascertained custom, or express contract. The general custom of trade gives warehousemen and wharfingers a lien on goods in their possession for a general balance between them and their customers (*z*): but their lien for labourage and warehouse room arises only by express or implied contract; and when the custom is disputed in the place where the wharfinger lives, he cannot set it up without having given express notice to the customer that he will deal with him only on those terms (*a*).

At common law a carrier has a right to detain goods which he has received to be carried, until the reasonable charges for carrying have been paid to him by the owner or employer (*b*). He has the same right, even where goods have been delivered to him by a wrongful owner, and are claimed by a rightful owner, to detain them from the latter until the charges are paid. This doctrine was held by Holt, C. J., against Powell, J., in *Yorke v. Greenough* (*c*), and appears to be correct (*d*).

The extent of a carrier's lien depends entirely on reasonable usage (*e*). And when it is attempted to extend it beyond the limits of the common law, as defined above, the generality of the usage must be proved clearly; and four or five instances of such an usage by particular carriers will be insufficient to bind a customer with such a

(*z*) *Naylor v. Mangles*, 1 Esp. N. P. Cas. 109; *Spears v. Hartley*, 3 Esp. 181; *Boch v. Gorrisen*, 30 L. J. 39, Ch.

(*a*) *Holderness v. Collinson*, 7 B. & C. 212; *R. v. Humphrey*, M'Clel. & Young, 173.

(*b*) *Skinner v. Upshaw*, 2 Lord Raym. 752.

(*c*) 2 Lord Raym. 867; *Butler v. Woolcott*, 2 N. R. 64.

(*d*) See Cross on Lien, 28.

(*e*) *Leuckhart v. Cooper*, 3 Bing. N. C. 107.

knowledge of it as will support an implied contract of lien between himself and a carrier (*f*). The doctrine of lien by carriers is not favoured at common law (*g*); and, therefore, a carrier who claims a lien, not only for the particular goods which he carries, but also for the general balance of an account, must either prove a distinct usage, or some other kind of implied or special contract between himself and his customer. Thus, in *Rushforth v. Hadfield*, it was held, that a carrier's common law right of lien does not extend beyond a lien for the carriage price of the particular goods; and that any more extensive lien is against public policy, and can only be created by express contract; or by such evidence of a general usage as will induce a jury to infer the knowledge and adoption of it by the customer in his contract with the carrier. Therefore a lien claimed by the carrier to detain goods for the general balance of an account between himself and a customer, was held to be unfounded, in the absence of sufficient evidence of a general usage to detain goods on such grounds (*h*). But such a lien will be good, if founded on a general usage, or on an express contract; and evidence of the course of dealing between the parties will be evidence of such a contract (*i*).

Where a carrier stipulated, by notice to the plaintiff, that "all goods to whomsoever belonging" should be subject to a lien for any general balance due from the owners; and received goods consigned to A. B., as an undisclosed agent for the plaintiff; it was held, that the carrier had no lien against the plaintiff for a general balance due from A. B. But it would appear, from the reasoning in this case, that the lien would have attached, if the notice had been that the carrier should have a lien on the goods for any general balance due from the person

(*f*) *Rushforth v. Hadfield*, 6 East, 519; *Same v. Same*, 7 East, 224.

(*g*) *Boch v. Gorrissen*, 30 L. J. 42, Chan.

(*h*) *Holderness v. Collinson*, 7 B. & C. 212.

(*i*) *Rushforth v. Hadfield*, 6 East, 519; *Boch v. Gorrissen*, supra.

to whom they were consigned. In the actual case the lien did not attach, merely because there was nothing due from the plaintiff to the defendant on a general balance (*k*). In such a case the agent is the consignee for the purposes of delivery; and the carrier may detain the goods until the carriage is paid; but the agent is not an owner for the collateral purpose of creating or extending the lien.

Where there is a special agreement between the carrier and the customer as to the terms on which goods are to be carried, the agreement will not destroy the carrier's right of lien, unless the agreement be inconsistent with the existence of the lien. But if the charges are not to be paid till a future day, no lien attaches in the meantime (*l*).

Where goods come into the custody of a carrier who is not bound to receive them, or who receives them under a mistake, it appears that he will have a lien on them for reasonable charges; but he will be bound to deliver them to the owner on demand and payment or tender of such charges; and he cannot remit them to another carrier from whom he received them, nor otherwise detain them from the owner. Thus (*m*), where goods were transmitted to the plaintiff by a carrier, who forwarded them on to the plaintiff by the railway of the defendants; but it appeared that they had been forwarded by the defendants under a mistake as to the terms of the contract of carriage existing between themselves and the first carrier; and therefore, instead of delivering to the plaintiff when he claimed the goods, the defendants insisted on returning the goods to the first carrier, notwithstanding the offer of the plaintiff to pay all just charges; it was held, that the refusal of the defendants to deliver, was evidence of a conversion in trover; and that the plaintiff, on paying or tendering the charges, was entitled to his goods, although brought by mistake.

(*k*) *Wright v. Snell*, 5 B. & Ald. 50.
350.

(*m*) *Rooke v. Midland Railway*

(*l*) *Crawshay v. Homfray*, 4 B. & Company, 16 Jur. 1070.

If goods be delivered to a carrier in separate packages, or at different times, it appears that he has a lien on the whole number of packages for the payment of the charges on all and each of the packages, provided that the contract of carriage can be regarded as one. But if there be a separate contract in respect of each package the lien will attach to each, only in respect of the charges due on the carriage of that one package (*n*).

Although goods vest in the consignee as soon as they are sold, and the carrier, as against him, has a lien for the charge of carriage, such a lien will not affect the right of the consignor to stop *in transitu* (*o*).

A carrier's right of lien does not extend beyond the time when the goods are in his actual possession; and if he part with the possession, or otherwise waive his lien, he cannot recover it by resuming possession, or stopping the goods *in transitu* (*p*).

If a person contract for the carriage of himself or his luggage, or both, the carrier will have a lien on the luggage for something, but not for the full amount of the fare, in the event of the customer rescinding the contract (*q*). In such a case, if the passenger accompany his luggage, the carrier has a lien on the luggage for the carriage of the luggage, and also for the carriage of the passenger (*r*). He has no lien whatever on the person of the passenger; and an action of trespass to the person would lie against him for an assault in attempting to enforce such a claim (*s*). The carrier's common law remedy would be by action; but under the bye-laws of many railway companies a refusal

(*n*) *Chase v. Westmore*, 5 M. & S. 180; *Stevenson v. Blakelock*, 1 M. & S. 535.

(*o*) *Oppenheim v. Russell*, 3 Bos. & P. 42; *Leuckhart v. Cooper*, 3 Bing. N. C. 107.

(*p*) *Sweet v. Pym*, 1 East, 4; *Buller, J., Lickbarrow v. Mason*, *supra*; *Coombs v. Bristol and Exeter Rail-*

way, 27 L. J. 401, Exch.

(*q*) *Higgins v. Bretherton*, 5 Car. & P. 2.

(*r*) *Wolf v. Summers*, 2 Camp. 631.

(*s*) *Tollemache v. London and Great Western Railway*, 26 L. T. Rep. 222; and *infra*; cf. *Sunbolf v. Alford*, 3 M. & W. 248.

by a passenger to pay his fare is an offence punishable by penalty and summary conviction before a magistrate (*t*).

The Right of Carriers to Remuneration.

Before a carrier receives goods to be carried, and before he undertakes to carry a passenger, he is entitled to demand and to be paid a reasonable sum for carriage; and if the full price be not paid beforehand he may refuse to carry (*u*).

In — *v. Jackson* (*v*), Lord Kenyon said: "When no rate is fixed by law, the carrier is entitled to say on what terms he will carry (*x*). He is not obliged to take everything which is brought to his warehouse, unless the terms on which he chooses to undertake the risk are complied with by the person who employs him." In that case it was held that a carrier may charge for booking; and that a tender of a charge for conveyance, without an extra charge for booking also, is not a tender of a reasonable remuneration. So in *Harris v. Packwood* (*y*), Mansfield, C. J., said, that a carrier's charges "must be *reasonable*;" but Lawrence, J., said: "There is nothing unreasonable in a carrier requiring a greater sum when he carries goods of greater value; for he is to be paid, not only for his labour in carrying, but for the risk which he runs, which is greater in proportion to the value of the goods. I would not, however, have it understood that carriers are at liberty by law to charge whatever they please. A carrier is liable by law to carry everything which is brought to him, for a reasonable sum to be paid for the same for carriage, and not to extort what he will."

Therefore, if the carrier demand an exorbitant sum, the customer may tender what he conceives to be a reasonable remuneration; and, if the sum, so tendered, should be found

(*t*) *R. v. Frere*, 24 L. J. 63, M. C.

(*u*) *Best, C. J., Batson v. Donovan*, 4 B. & Ald. 28; *Parke, B., Wyld v. Pickford*, 8 M. & W. 448.

(*v*) 2 Peake, N. P. Cas. 185.

(*x*) Cf. *Erle, J., in M'Manus v. Lancashire and Yorkshire Railway*, 28 L. J. 354, Exch.

(*y*) 3 Taunt. 372.

to be reasonable, the carrier may be sued for refusing to carry (*z*). As soon as a reasonable sum is tendered, but not sooner, a common carrier, if he have room in his conveyance, is bound to carry all goods which he is in the habit of carrying, and according to the same scale of charges for all members of the public without distinction (*a*).

Under the Carriers Act, sect. 2, a carrier is entitled to demand an increased charge for goods above the value of 10*l.*, according to a rate notified by public notice and affixed in some conspicuous part of his office, warehouse, or receiving-house. If the carrier demand an unreasonable charge the employer may pay it under protest, and recover back the excess in an action for money had and received (*b*); and if such a payment be demanded as a condition precedent to the delivery of goods to the consignee, the latter is not bound to tender any specific sum as a reasonable payment, but may sue at once as for a non-delivery (*c*); although it is doubtful whether he can recover back a sum which he has paid, not under protest, in excess of the carrier's lawful and reasonable charges (*d*). The reasonableness of the charge is a question of fact and not of law (*e*); and where there is an inequality of charges it will be for the jury to say whether it is justified by the circumstances of the case. If there be extra risk, or extra trouble, there will be reason for charging one customer more than another, in fair proportion to the increase of risk, or trouble (*f*). Under that class of cases which are known

(*z*) *Pickford v. Grand Junction Railway Company*, 10 M. & W. 399.

(*a*) *Johnson v. Midland Railway Company*, 4 Exch. 367; *supra*, p. 35.

(*b*) *Parker v. Great Western Railway*, 7 M. & G. 253; *Glyn v. Thomas*, 25 L. J. 125, Exch.

(*c*) *Ashmole v. Wainwright*, 2 Q. B.

887; cf. *Field v. Newport*, 27 L. J. 396, Exch.

(*d*) Per Patteson, J., 2 Q. B. 845.

(*e*) Per Pollock, C. B., in *Crouch v. Great Northern Railway*, 25 L. J. 137, Exch.

(*f*) *Piddington v. South-Eastern Railway*, 27 L. J. 295, C. P.; *Garton v. Bristol and Exeter Railway*, 28 L. J. 169, Exch.; 4 H. & N. 73.

professionally as the "packed parcel" cases, and which will be noticed more appropriately in a later chapter, it seems to be assumed, although it cannot be said to be clear, that at common law a carrier's charges must be fair, reasonable, and equal for all persons under like circumstances. But the statement in a work of high authority (*g*), that "the hire charged must not be more to one (though a rival carrier) than to another for the same service," has been declared to be "incorrectly expressed. It ought to state that, where a higher charge is made than is charged to another person for the same services, there would be evidence upon which a jury might come to the conclusion that it was an unreasonable charge; and for this simple reason, that, unless circumstances were shown to explain why it was that a low charge was made to another person, that charge might be taken by the jury, as it ordinarily would be, as a reasonable charge" (*h*). This subject will be continued in a later chapter (*i*).

Where the customer refuses to pay the carrier's reasonable charges, the carrier may recover in an action on a *quantum meruit* (*k*).

Even where the charges tendered are reasonable the carrier will not be bound to receive goods until he is ready for his journey (*l*). But if a carrier or his agent agree to carry for a certain sum, he cannot charge a larger sum, although the larger sum be the usual and fixed charge, and the less sum was demanded and accepted by mistake (*m*). A carrier has no right to open a parcel in order to estimate the charge for carriage (*n*).

If a carrier, even from unavoidable accident, deliver his consignment at a point short of their destination, he cannot

(*g*) 1 Smith's Lead. Cas. 174, 4th ed.

(*h*) Willes, J., 27 L. J. 145, C. P.

(*i*) *Infra*, Chapter XIV.

(*k*) *Bastard v. Bastard*, 2 Show. 81.

(*l*) *Lane v. Cotton*, 1 Lord Raym. 652.

(*m*) *Lord Tenterden, Winkfield v. Packington*, 2 Car. & P. 599.

(*n*) *Crouch v. London and North-Western Railway*, 2 C. & K. 739; *Garton v. Bristol and Exeter Railway*, 4 H. & N. 73; 28 L. J. 169, Exch.; aff. Sc. Cam., 5 H. & N. 831.

claim generally his fare, nor any rateable part of it. "To justify a claim for *pro ratâ* freight there must be a voluntary acceptance of goods at an intermediate port [or place] in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with" (o). When the master of a vessel, on being obliged to put into an intermediate port in consequence of a hurricane, found his cargo of rice so much damaged by the storm, and in a state of putrefaction, that he was forced to sell it, and sold it accordingly *bonâ fide*; - it was held that no freight was due either for the whole voyage, or *pro ratâ itineris*; and, generally, no such claim can be sustained except by special contract (p).

There are various local acts by which the rates of carriage are fixed for particular districts. Thus, by the London Portage Act, 39 Geo. 3, c. 58, a table of rates is fixed for the carriage, within the metropolitan district, of all parcels not exceeding half a hundredweight; and summary process is prescribed for recovering such charges before a magistrate; and penalties are similarly recoverable against carriers who demand more. Also, by 16 & 17 Vict. c. 33 and c. 127, the rates of carriage by hackney-carriage drivers are fixed within the metropolitan district: and in many boroughs and counties the justices at quarter sessions are empowered to fix similar tables of fares.

It may be desirable in this place to notice a few remaining and miscellaneous liabilities of carriers, which could not be comprised conveniently under the heads of the foregoing chapters.

Travelling on Sundays.

The 3 Car. 1, c. 1, enacts, "that no carrier with any horse or horses, nor waggon-man, with any waggon or waggons, nor carman, with any cart or carts, nor vanman,

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| (o) Per Parke, B., <i>Vlierboom v. Chapman</i> , 13 M. & W. 238. | Rep. 170; cf. <i>Ritchie v. Atkinson</i> , 10 East, 295; <i>Hunter v. Priusep</i> , 10 East, 378. |
| (p) <i>Ibid.</i> ; <i>The John</i> , 3 Rob. Adm. | |

with any van, nor drovers with any cattle," shall exercise his calling on Sunday on pain of a penalty of 20s., recoverable within six months, after the commission of the offence, by conviction before a justice of the peace or chief officer of a borough. The driver of a van from London to York has been convicted under this statute (*q*). But the operation of this act is confined strictly to the classes of carriers specified in it, and is held not to include stage-coach drivers; nor, by the same reasoning, could it include a railway train, nor an ordinary hackney-carriage (*r*).

Highway Regulations.

Carriers or drivers of vehicles are subject to various duties and liabilities to the public, under the various Highway and Turnpike Acts. Thus, by 3 Geo. 4, c. 126, s. 130, one driver may drive two one-horse carts, but not on any turnpike-road within ten miles of London. By the 131st section, no vehicle can be driven on a turnpike-road by a driver under the age of thirteen, under a penalty of 10*l.* recoverable from the owner. By sect. 132, the driver of a waggon or a cart must not ride in the vehicle, unless some other person guide it on foot. Any driver wilfully or negligently quitting the road, or causing damage to any person or carriage; or driving a carriage for hire, waggon or cart, not having the owner's name painted thereon; or not keeping the left or near side; or hindering the free passage of any other carriage; may be convicted before any justice of the peace of the district, in a penalty of 40s.; and, if the owner of the vehicle, in a penalty not exceeding 5*l.*; and in any such case, if the driver refuse to discover his name when required, he may be committed for three months to the house of correction.

Larceny by Carriers.

Formerly, a carrier, as a bailee only of goods, could not commit a larceny of them: and a conversion of them to

(*q*) Ex parte Middleton, 3 B. & C. 164.

(*r*) Sandiman v. Breach, 7 B. & C. 96.

his own use was only a breach of trust. But now, "if any person being a bailee of any property shall fraudulently take or convert the same to his own use, or the use of any person, other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny" (s). Under this section, a bailee may be convicted of larceny, whenever it appears that he intended to deprive the owner permanently of his goods; or whenever he deals with the property fraudulently in such a way as to disable him from returning the property to the bailor when required by him so to do: as where the bailee of a chest of plate broke open the chest and pawned the plate (t).

Where goods are stolen from a carrier, or otherwise wrongfully taken from him, he has such a property as will support an indictment, or an action, in his own name as owner.

(s) 20 & 21 Vict. c. 54, s. 4.

(t) *Reg. v. Trebilcock*, 27 L. J. 103, M. C.

CHAPTER XI.

ACTIONS AGAINST AND BY CARRIERS.

*Pleadings and Evidence—The Measure of Damages—Costs.*

It is not intended in this chapter to treat either completely or elaborately of the forms of pleading in actions against carriers, or by them; but it is proposed to state only the prominent rules, and a few of the ordinary cases, which occur most constantly in practice, together with the requisite evidence in such cases. The present simplicity of pleadings, and the gradual and advancing simplification to which all pleadings have been subjected since the Common Law Procedure Acts, 1852 and 1854, and the new pleading rules have been in operation, render it unnecessary and superfluous to increase the bulk of this treatise by reviewing and analysing the numerous pleading cases which have arisen under the law of carriers. Generally it will be borne in mind that, under the Common Law Procedure Act, 1852, all pleadings, however inartificial, are sufficient if they set out, clearly and intelligibly, the substantial cause or ground of the declaration, or other pleading; that questions of fact, after writ issued, may, by consent of the parties and leave of a judge, be raised without any formal pleadings (15 & 16 Vict. c. 76, s. 42); that questions of law may be raised summarily in a special case for the opinion of the court (15 & 16 Vict. c. 76, s. 46); that where there are pleadings they may generally, in any stage of an action, and even at trial, be amended, and ought to be amended, by the court, or a judge, in order to raise the substantial issue on the

merits of the case between the parties (sect. 222; cf. 23 & 24 Vict. c. 126, s. 36); and that where an adverse party objects to the inartificial nature of a pleading, as calculated to "prejudice, embarrass and delay the fair trial of the action," he cannot, as formerly, demur specially, but, unless he waives the defect, must apply to a judge to strike out the pleading, or to order it to be amended (sects. 51, 52). In order to encourage simplicity and conciseness of pleading, the act gives several forms as specimens and examples for the construction of future pleadings.

The leading principles of pleading in actions against and by carriers will now be stated.

The Parties to an Action.

In an action against a carrier, for the loss or damage of goods, the owner, who is generally the vendee or consignee, is the proper plaintiff; for a delivery of the goods to the carrier vests the ownership *primâ facie* in the consignee; and when goods are sent to a vendee or consignee by his authority, the carrier is presumptively the agent of the consignee (*a*). But the delivery of goods to a carrier does not necessarily vest the ownership in the consignee. This principle was discussed and stated elaborately in the House of Lords, in *Dunlop v. Lambert* (*b*), where the Lord Chancellor said:

"It is no doubt true, as a general rule, that the delivery by the consignor to the carrier is a delivery to the consignee; and that the risk is, after such delivery, the risk of the consignee. This is so if, without designating the particular carrier, the consignee directs that the goods shall be sent by the ordinary conveyance; the delivery to the ordinary carrier is then a delivery to the consignee, and the consignee incurs all the risks of the carriage. And it is still more strongly so, if the goods are sent by a

(*a*) *Dawes v. Peck*, 8 T. R. 330; *King v. Meredith*, 2 Camp. 639.
Dutton v. Solomon, 3 B. & P. 582; (*b*) 6 Cl. & Finn. 600.
Brown v. Hodgson, 2 Camp. 36;

carrier, specially pointed out by the consignee himself; for such carrier then becomes his special agent.

“But though the authorities all establish the general inference as I have stated, yet that general inference is capable of being varied by the circumstances of any special arrangement between the parties, or of any particular mode of dealing between them. If a particular contract be proved between the consignor and the consignee;—and the circumstance of the payment of freight and insurance is not alone conclusive evidence of ownership—as where the party undertaking to consign undertakes to deliver at a particular place—the property, till it reaches that place and is delivered according to the terms of the contract, is at the risk of the consignor. And again, though, in general, the following the directions of the consignee, and delivering the goods to a particular carrier, will relieve the consignor from the risk, he may make such a special contract, that, though delivering the goods to the carrier specially intimated by the consignee, the risk may remain with him; and the consignor may, by a contract with the carrier, make the carrier liable to himself. In an infinite variety of circumstances, the ordinary rule may turn out not to be that which regulates the liabilities of the parties.”

Accordingly, in such circumstances, where the consignor has specially contracted with the carrier, or otherwise retains the ownership of goods, he will be the proper party to sue; and where it is doubtful whether goods were delivered to the carrier at the risk of the consignor or at the risk of the consignee, the question is for the jury (*c*). By these principles, also, a carrier will determine whether he should sue the consignor or consignee for hire, &c.

Thus, where goods are consigned to A. for the use of the consignor; or, generally, where they are consigned to a person as agent for a consignor, the consignor is the proper party to sue (*d*). So, where they are sent to a

(*c*) *Dunlop v. Lambert*, sup. p. 208. (*d*) *Sargent v. Morris*, 3 B. & A. 277.

person merely for inspection (*e*). And generally, when the circumstances show that the consignor contracted specially with the carrier, and that he did not intend to part with the property in the goods, he is the proper person to sue (*f*).

Where a laundress sent home linen, which she had washed, to the owner by a carrier, whom she paid, it was held, that she was the proper plaintiff to sue for its loss on the transit, as her risk as bailee was not ended till the owner had received his linen back, and as he had had nothing to do with the employment of the carrier (*g*).

Where a person enters into a contract of carriage on behalf of specified consignees, as their agent, but signs it in his own name, without apt words indicative strictly of his exclusively procuratorial character, he is the proper party to sue and to be sued on the contract (*h*).

Where the property in goods has passed to a consignee, it is no defence to an action by him against the carrier for the loss that the consignor has claimed, and that the carrier has *bonâ fide* paid him the amount of the loss (*i*).

Where the case is within the Statute of Frauds, it will be important, in determining the question of ownership, to ascertain whether the contract of sale is complete within the requisites of the statute. Thus, where A.'s traveller ordered goods from the plaintiff above the value of 10*l*. for A.; nothing was said as to the mode of transmitting them to A.; no contract was signed, but the plaintiff transmitted the invoice to A.: it was held, that there was no acceptance of the goods by A.; no complete contract with A.; and therefore that the plaintiff, as consignor, was the person to sue for the loss on the transit (*k*).

(*e*) *Swain v. Shepherd*, 1 M. & R. 221.

(*f*) *Dunlop v. Lambert*, *supra*; cf. 1 Smith's Lead. Cas. 103 b; 1 Chitty, P. E. 6th edit. 6.

(*g*) *Freeman v. Birch*, 3 Q. B. 492, n.

(*h*) *Cooke v. Wilson*, 1 C. B., N. S.

153; 26 L. J. 15, C. P.; *Joseph v. Knox*, 3 Camp. 320.

(*i*) *Coombs v. Bristol and Exeter Railway*, 3 H. & N. 1; 27 L. J. 269, Exch.

(*k*) *Coates v. Chaplin*, 3 Q. B. 483; cf. *Fragano v. Long*, 4 B. & C. 219.

So even where the consignee names a particular carrier to a vendor, the vendor and not the consignee is the proper person to sue for a loss, if the contract be incomplete within the statute; and in order to render such a contract complete by a constructive acceptance, it is necessary that the consignee should have an opportunity to examine and reject the goods before acceptance. Thus, where the plaintiff agreed orally with A. to take, at a certain price, all the whalebone which A. should send by the defendants, the Bristol and Exeter Railway, to the plaintiff; and the defendants settled the loss on the transit with A.; it was held, that the plaintiff could not maintain the action, as the property had not passed out of A. (*l*). *Hart v. Sattley* (*m*), which is opposed to this doctrine, must be considered to be overruled (*n*).

Where the consignor has made himself personally responsible for the hire of carriage he will be the proper party to sue for a loss (*o*); and it follows, that, unless the consignee refuse to accept, the latter is the proper party to be sued for hire. If the consignee refuse to accept, the consignor will be liable for the hire, according to the principles which have been stated in an earlier chapter.

In *Sheridan v. North Quay Company* (*p*), the facts were very special, but the substantial questions were, whether the property in goods had passed to the plaintiff as a purchaser from A. who had bought them from B., but had not paid B. for them in accordance with terms which the court held to be in the nature of a condition precedent to a complete contract of sale. While the right of property was in dispute the goods came into the possession of the defendants, as carriers for the plaintiff; and there was some evidence, which was held ultimately to be insufficient, to show that

(*l*) *Coombs v. Bristol and Exeter Railway*, 27 L. J. 401, Exch.

(*m*) 3 Camp. 528.

(*n*) *Meredith v. Meigh*, 22 L. J. 401, Q. B.

(*o*) *Davis v. James*, 5 Burr. 2680; *Sargent v. Morris*, 3 B. & Ald. 277.

(*p*) 28 L. J. 58, C. P.; cf. *Sanquer v. London and South-Western Railway*, 16 C. B. 163.

the goods had come into the possession of the defendants, as the bailees of the plaintiff, with the constructive consent of B. In an action against the defendants for the non-delivery, it was held, that it was a good defence to show that the defendants had given up the goods to B. at his request, as the property had never passed out of him.

In this case the question arose on the effect of a bill of lading in passing property, where the bill of lading had been actually transmitted by the vendor to the first nominal purchaser, but had never reached the latter. In connection with this subject may be noticed a recent act (*q*), by which "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself." But this enactment is not to affect any rights of stoppage *in transitu*, nor claims for freight against any original shipper or owner, &c. (*r*).

By "The Customs Tariff Amendment Act, 1860," the term bill of lading is "construed to mean any bill of lading, or other instrument equivalent thereto or used in the place thereof, or the consignment or forwarding of any goods to foreign parts, or which shall or may be used by any shipper, carrier, forwarder, or consignee, broker, or other person as and for or to serve the purpose of a bill of lading or the exportation of goods, whether shipped direct from the port of shipment or forwarded by railway, canal, or other mode of transit or carriage to any port or place for shipment" (*s*). It extends also to the shipping bill, which every exporter of goods is bound in all cases, in which a shipping bill or bill of lading is required by law, to deliver to an inland carrier, who conveys the goods to the port of ship-

(*q*) 18 & 19 Vict. c. 11, s. 1.

(*r*) Ibid. s. 2.

(*s*) 23 Vict. c. 22, s. 21.

ment, and which the carrier must get signed by the master of the ship, and deliver to the proper officer of customs before or within twenty-four hours of the final clearance of the ship. The penalty for any non-compliance with the terms of this section by any carrier is forty shillings (*t*), and the term carrier or forwarder is defined to mean "any public carrier or other person undertaking the through carriage by land or sea of any goods to foreign parts, or the carriage of any goods to any port or place of shipment, to be there shipped and exported to foreign parts." The term goods means only wares and merchandize exported in the way of trade, and does not apply to small parcels or articles, for which shipping bills are not required (*u*).

The mere possession of goods by a carrier as a bailee entitles him to maintain an action against any one for loss or damage to them while they are in his hands (*x*).

In the preceding cases the right of a customer to sue for the loss of goods has been considered only as arising out of the contract which has been either made expressly between the parties, or which has been implied from the circumstances of particular cases. But since the relationship of carrier and consignee, and probably also that of carrier and consignor, arises as much out of a common law duty as of a contract on the part of the carrier to carry safely, it seems that any consignor or consignee, by virtue of his bailment, and of his immediately antecedent possession or holding of the goods, may sue the carrier for loss or damage to them, although such consignor or consignee is not the owner of the goods, nor even strictly himself a bailee. Thus a servant, travelling with his master on a railway and having the care of his master's luggage, may sue for the loss, although the master takes and pays for the servant's ticket; for the liability of the carrier in such

(*t*) Ibid. s. 23.

(*u*) Ibid. s. 24.

(*x*) *Jefferies v. Great Western*

Railway Company, 5 Ell. & Bl. 502;
25 L. J. 107, Q. B.

a case is for the breach of a duty, which is independent of a contract (*y*).

The nonjoinder or misjoinder of plaintiffs may be amended before or at trial (*z*); and the misjoinder of defendants may be amended before or at trial in any action or contract, on such terms as the court may think proper (*a*).

Where there is a joint bailment by several, as where there are several owners of different goods contained in one package, all may join as plaintiffs in suing for the loss of the package (*b*).

Where there are several who carry as partners, all may be sued; and a contract by one is a contract by all. But they may also be sued separately; for, by the 11 Geo. 4 & 1 Will. 4, c. 68, s. 5, it is enacted, that "any one or more of mail contractors, stage-coach proprietors, or common carriers, may be sued by his, her, or their name or names only; and no action or suit for damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or co-partner." In case of negligence of servants, it has been held that one of two joint proprietors, who has been sued separately, may recover contribution against his co-proprietor, if the former was not present when the accident occurred (*c*); but no action can be maintained by the personal representative of a person killed by accident, if such person contributed to the accident by his own negligence (*d*).

Where the action is for damage to an owner or passenger, he is the proper person to sue; but where he is killed by accident during the transit, an action may be brought,

(*y*) *Marshall v. York, Newcastle and Berwick Railway*, 11 C. B. 655; 21 L. J. 34, C. P.; *Tattan v. Great Western Railway Company*, 29 L. J. 184, Q. B.; cf. *Legge v. Tucker*, 1 H. & N. 500; 26 L. J. 71, Exch.

(*z*) 15 & 16 Vict. c. 76, ss. 34—36; 23 & 24 Vict. c. 126, ss. 19, 36.

(*a*) 15 & 16 Vict. c. 76, s. 37;

Holden v. Ballantyne, 29 L. J. 148, Q. B.

(*b*) *Metcalfe v. London and Brighton Railway*, 27 L. J. 333, C. P.

(*c*) *Woolley v. Batte*, 2 Car. & P. 417.

(*d*) *Tucker v. Chaplin*, 2 C. & K. 730; cf. *Simon v. Ward*, 28 L. J. 139, Q. B.

within twelve months after the accident, in the name of his executor or administrator, and damages may be recovered for the benefit of the relations of the deceased (9 & 10 Vict. c. 93). In such a case the carrier may be sued for the negligence of his servant (*e*).

The Form of Action.

Under the old pleading forms, a carrier might either be sued in *assumpsit* for a breach of his express or implied contract to carry; or in *case* for negligence (*f*); or in *trover* for *conversion*. The same rights and forms of action exist substantially, notwithstanding the legislative abolition of forms of action. Thus, in an action against common carriers, it is not necessary to prove a contract; for a breach in such a case is as much in the nature of a tort as of a breach of contract (*g*). In *assumpsit*, the declaration is founded on an express or implied promise; in *case*, on the *duty* of the carrier to carry. Debt will not lie for the breach of an agreement to carry (*h*).

“Causes of action, of whatever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same suit,” unless the court or a judge think such a combination of trials inexpedient (*i*).

The Declaration.

In an action against a carrier for losing goods, the contract and the termini should be stated correctly (*k*); but a variance is generally amendable at trial. The delivery and receipt of the goods must be averred so as to raise a

(*e*) *Tucker v. Chaplin*, 2 C. & K. 730; *Thorogood v. Bryan*, 18 L. J. 336, C. P.

(*f*) *Ansell v. Waterhouse*, 6 M. & G. 385.

(*g*) *Pozzi v. Shipton*, 8 Ad. & Ell. 963; *Marshall v. York and Newcastle Railway*, 11 C. B. 655; 21 L. J.

34, C. P.; *Tattan v. Great Western Railway*, 29 L. J. 184, Q. B.

(*h*) *Bracegirdle v. Hincks*, 9 Exch. 301; 23 L. J. 128, Exch.

(*i*) 15 & 16 Vict. c. 76, s. 41.

(*k*) *Hayman v. Raymond*, 5 Taunt. 289.

contract to carry safely and securely for hire (*l*); and the breach must be assigned distinctly. When the carrier is declared against as a common carrier, the contract may be treated and stated as implied; in other cases, the contract should be stated expressly (*m*).

Pleas in Abatement.

By 1 Will. 4, c. 68, s. 8, no action or suit for damage for loss or injury to any parcel, package, or person shall abate for the want of joining any co-proprietor or co-partner (*n*).

Payment of Money into Court.

The 11 Geo. 4 & 1 Will. 4, c. 68, s. 10, enacts, that, in all actions to be brought against any mail contractor, stage-coach proprietor, or other common carrier, for the loss of, or injury to, any goods delivered to be carried, whether the value of such goods shall have been declared or not, it shall be lawful for the defendant or defendants to pay money into court in the same manner and with the same effect as money may be paid into court in any other action.

The General Issue.

The New Pleading Rules, Hilary Term, 1853, ss. 6 and 16, determine the effect of *non assumpsit* and not guilty in actions against a carrier. Sect. 6 declares that:

“In all actions on simple contract, except as hereinafter excepted, the plea of *non assumpsit*, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract, promise, or agreement alleged may be implied by law; *ex. gr.* :—

“In actions against carriers and other bailees for not

(*l*) *Max v. Roberts*, 12 East, 89;
*Pianciani v. London and South-
Western Railway*, 18 C. B. 226.

(*m*) *Pozzi v. Shipton*, 8 Ad. & Ell.
963; *Bowman v. Brown*, 3 Q. B. 510.

(*n*) Cf. 15 & 16 Vict. c. 76, ss.

delivering or not keeping goods safe, or not returning them on request, such plea will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach."

The 16th rule declares that,

"In actions for torts the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration; *ex. gr.* :—

"In actions against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received." This rule, therefore, corresponds with the decision in *Webb v. Page (o)*, where, in case against a carrier for the negligent loss of goods delivered to him to be carried for hire, the plea of not guilty was held to admit the receipt of goods by the defendant, under a contract safely and securely to carry and deliver, and merely operated as a denial of the loss by the defendant's negligence. In trover, not guilty admits the property of the plaintiff; and, therefore, the defendant cannot under this issue raise any claim of title (*p*).

In reference to this subject may be noticed the 15 & 16 Vict. c. 76, s. 74 (C. L. P. Act, 1852), which enacts, that "whereas certain causes of action may be considered to partake of the character both of breaches of contracts and of wrongs: and doubts may arise as to the form of pleas in such actions, and it is expedient to preclude such doubts: any plea which shall be good in substance shall not be objectionable on the ground of its treating the declaration

(*o*) 1 Scott, N. R. 951; cf. *Elwell v. Grand Junction Railway*, 5 M. & W. 669.

(*p*) *Jones v. Davies*, 6 Exch. 663.

either as framed for a breach of contract or for a wrong." On this section it has been remarked: "it may naturally be inferred from the language that if an action be brought against a carrier for the loss of a parcel, and the declaration be so framed as not clearly to show whether the plaintiff is complaining of a breach of contract or of a tort, the defendant will be equally safe in pleading *non assumpsit* or not guilty: and that the pleas, though differing in form, will be regarded as substantially setting up the same defence. The fact, however, is quite otherwise; for while the plea of *non assumpsit* will put in issue the promise, and admit the breach, the plea of not guilty will admit the bailment and deny the breach. This is obviously a result never contemplated by the framer of the clause in question" (q).

Under *non assumpsit* the defendant cannot raise a defence under the Carriers' Act; but such a defence must be pleaded specially. Thus, where the defendant wished to avail himself of a want of notice under this act, it was held that he could not do so under the general issue (r). This case was decided on the repealed rules of Hilary Term, 4 Will. 4; but the rules of Hilary Term, 1853, as stated above, are similar as to the effect of the general issue.

Evidence for Plaintiff in Assumpsit.

In *assumpsit* against a carrier for loss or damage of goods, it must be proved that the defendant is a carrier, and that he contracted to carry; that the goods were delivered to him, and not delivered by him; or that they were delivered damaged. Prove also the value, and any special damage.

1. If the defendant is a common carrier, prove such circumstances as bring him within the definition of one; *ex. gr.*, that he plies regularly for hire from one place to

(q) Taylor on Evidence, s. 283, v. Penott, 2 Exch. 522.
vol. i. p. 290, 3rd ed.; cf. Webb v. (r) Syms v. Chaplin, 5 Ad. & Ell.
Page, 6 Scott, N. R. 951; Mounsey 634; cf. Davey v. Mason, C. & M. 45.

another place; and that he carries the description of goods which are sued for. If the defendant be a common carrier, proof of the receipt of goods fixes him with the liabilities of one; and it will be sufficient to show a non-delivery to prove a loss; or the amount of damage done when the goods were delivered or tendered to the consignee. If the defendant be not a common carrier, prove the special contract, if there be one, or circumstances which show an implied contract to carry safely and securely, either absolutely, or so far as due and reasonable carefulness extends. It is not necessary to aver or prove a readiness to pay the hire, unless it be traversed (*s*).

2. Prove the delivery of the goods to the defendant. A delivery to an authorized agent is sufficient (*t*); but the agency must also be proved; and a mere delivery to a general booking-office keeper, with directions to deliver the goods to a carrier, is insufficient; unless the booking-office keeper be also in fact the agent to receive and collect for the carrier (*u*).

3. Prove the loss or amount of damage. Slight evidence of a loss, such as proof that goods were not in a parcel when it was delivered to the consignee (*x*), or that the goods were never delivered to him, or that he or his agents have heard nothing of them, is sufficient to render the carrier liable for non-delivery (*y*). The proof may also be of non-delivery within a reasonable time (*z*). The question of damages will be considered subsequently.

Evidence for the Carrier in Non Assumpsit.

Under *non assumpsit*, the carrier may show that he is not a carrier; that he neither expressly nor impliedly under-

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| (<i>s</i>) Wyld <i>v.</i> Pickford, 8 M. & W. 443. | Western Railway, 2 C. & K. 789. |
| (<i>t</i>) Williams <i>v.</i> Cranston, 2 Stark. 82. | (<i>y</i>) Griffiths <i>v.</i> Lee, 1 Car. & P. 110; 1 Smith's Lead. Cas. 103. |
| (<i>u</i>) Gilbert <i>v.</i> Dale, 5 Ad. & Ell. 543; see Carriers Act, s. 5. | (<i>z</i>) Raphael <i>v.</i> Pickford, 5 M. & G. 551; Pickford <i>v.</i> Grand Junction Railway, 12 M. & W. 766. |
| (<i>x</i>) Crouch <i>v.</i> London and North- | |

took to carry; but he cannot prove delivery to the consignee, nor otherwise traverse the breach (*a*). Where he pleads any defence under the Carriers' Act, or other special matter, he must prove all his substantial averments (*b*). He may also give evidence in reduction of damages.

The carrier, under the general issue of not guilty, may disprove the loss or damage, but not the receipt of goods (*c*); or he may show any circumstances which disprove the negligence, where negligence is the ground of the plaintiff's action (*d*). But if the defendant intends to justify on the ground that the negligence was the fault of the plaintiff, he cannot show this under the general issue, but must plead it specially (*e*).

Under not guilty the carrier may also prove an actual or constructive delivery (*f*). Where the declaration averred that the defendants, as common carriers, received goods to be carried for reward; and the plea denied that the defendants received the goods as common carriers; this plea was held to be proved by evidence that the defendants did not receive goods to be carried by them as common carriers, unless the consignor signed a paper of conditions, which the court thought reasonable (*g*).

The Measure of Damages.

Where damages are sought for the loss of goods, the general value must be proved; and the value of the goods at the time of the loss or the conversion, will be the measure of damages (*h*). Generally, when a bailee for hire is

(*a*) Rule, Hil. T. 1853, *supra*.

(*b*) Reg. Hil. T. 1853, 8, 17; *Sanquer v. London and South-Western Railway*, 16 C. B. 163.

(*c*) Rule, Hil. Term, 1853, *supra*.

(*d*) *Carpue v. London and Brighton Railway*, 5 Q. B. 747.

(*e*) *Webb v. Page*, 6 M. & G. 196; *Great Northern Railway v. Harrison*,

10 Exch. 376; 23 L. J. 308, Exch.; *Sanquer v. London and South-Western Railway*, 16 C. B. 163.

(*f*) *Hyde v. Trent and Mersey Navigation*, 5 T. R. 389.

(*g*) *White v. Great Western Railway*, 2 C. B., N. S. 7; 26 L. J. 158, C. P.

(*h*) *Mercer v. Jones*, 3 Camp. 477.

sued for such a loss, the damages will be measured by this rule; and where the essence of the bailment is safe custody only, as in the case of a warehouseman, the bailee is not answerable for any special or consequential damage arising to the bailor from the loss beyond the value of the goods, unless such a liability have been created in him by express contract. Thus, where a commercial traveller sued a railway company, as warehouseman, for the loss of a case of patterns, it was held, that he could recover only the value of the case and of the patterns; but neither salary, nor the expenses which he had incurred while he was waiting for new patterns; still less the loss of profit on business which otherwise he would have made during the interval (*i*).

It will be sufficient to prove a general and average aggregate of value; and the courts will not require minutely distinct evidence as to the particular value of the goods, nor of the separate articles of a package. When goods are lost by the wrongful act of a person, the presumption is that, as against that person, the goods were the best of their kind. Thus, in *Armory v. Delamirie* (*k*), in trover for a jewel, Pratt, C. J., directed the jury that, unless the defendant could disprove that it was of the finest quality, they ought to presume it to be so; and that the measure of damages would be the value of such a jewel. So, in *Butler v. Basing* (*l*), in trover against a carrier for a box, as to the contents of which there was no distinct evidence, Garrow, B., recommended the jury "not to pare down the amount of damages, because the articles contained in it could not be distinctly proved; and to give damages proportioned to the value of the articles, which they in their judgment thought the box might contain." It is right to observe, that the learned judge based his recommendation on the fact that the owner of the box, the plaintiff, who probably packed the box, could not be examined as to its

(*i*) *Anderson v. North-Eastern Railway*, 9 W. R. 519; 4 L. T. Rep., N. S. 216.

(*k*) 1 Str. 505; 1 Smith's Lead. Cas. 256.

(*l*) 2 Car. & P. 613.

contents. But this reasoning would not apply under the present law of evidence (*m*).

In the case of lost valuable goods under the Carriers' Act, a more stringent rule has been adopted than at common law, in measuring damages; and it appears that more distinct proof of value is required. The 9th section of the act provides, that "mail contractors, stage-coach proprietors, or other common carriers for hire, shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid" (sect. 1): "but that he or they shall, in all cases, be entitled to require from the party suing in respect of any loss or injury, proof of the *actual value* of the contents by ordinary legal evidence; and that the mail contractors, stage-coach proprietors, or other common carriers as aforesaid, shall be liable to such damages only as shall be so proved as aforesaid (by sect. 7), not exceeding the declared value, together with the increased charges as before mentioned;" viz. by sect. 7, which provides that "where any parcel or package shall have been delivered at any carrier's office, and the value and contents declared," and the increased rate of charges been paid, and such parcel or package shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage, shall also be entitled to recover back such increased charges so paid as aforesaid, in addition to the value of such parcel or package.

A carrier's liability for damages is greater than that of a warehouseman, or bailee, for safe custody only. He is assumed to know that the goods are going for some purpose, and so far has notice which renders him responsible for damages resulting from loss of the goods beyond their actual value (*n*), but not for any inconvenience or vexation which the plaintiff may suffer from the breach of con-

(*m*) 14 & 15 Vict. c. 99, s. 2.

North-Eastern Railway, 4 L. T. Rep.

(*n*) Pollock, C. B., Anderson v. 216.

tract (*o*). He is liable only for the reasonable or proximate, and not for the remote, consequences of his breach of contract.

The rule on this head has been thoroughly settled in a leading case (*p*). There damages were claimed from a carrier for a delay of several days in the delivery of some pieces of broken iron to the engineer who was to repair them. The defendant had been informed, at the time of the bailment to him, that the pieces formed the broken shaft of the plaintiff's mill, but not that the mill could not be worked until the shaft should be returned. The plaintiff claimed compensation for the loss of the profits which he would have made by his mill if the shaft had been returned at the proper time. The judge left the question of damages to the jury, without any special direction; but the court above granted a new trial, on the principle that the jury should have been told not to take the loss of profit into consideration at all in estimating the damages; and Alderson, B., in delivering the judgment of the court, said: "We think the proper rule in such a case is this:—Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be either such as may fairly and reasonably be considered arising naturally, i. e., according to the usual course of things (*q*) from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances, under which the contract was actually made, were communicated by the plaintiff to the defendant, and thus known to both parties, the damages

(*o*) *Hamlen v. Great Western Railway*, 1 H. & N. 408; 26 L. J. 22, Exch.

(*p*) *Hadley v. Baxendale*, 9 Exch. 341; 23 L. J. 179, Exch.

(*q*) *Gee v. Lancashire Railway*, 30 L. J. 11, Exch.; *Wilson v. Lancashire and Yorkshire Railway*, 3 L.

T. Rep., N. S. 859.

resulting from such a breach of contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances, so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and, in the great multitude of cases, not affected by any special circumstances, from such a breach of contract:" and his Lordship, after remarking that the stoppage of the mill was not such a necessary consequence of the delay as the defendant could know, without special communication, added: "It follows, therefore, that the loss of profit here cannot reasonably be considered such a consequence of a breach of contract, as could have been fairly and reasonably contemplated by both these parties when they made this contract; for such a loss would not have naturally flowed from the breach of this contract in the great multitude of such cases, occurring under ordinary circumstances; nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendant."

In such cases it has been suggested, that the proper measure of damages for the non-delivery of a chattel, on a fixed day, should be either an average per centage of mercantile profits (*r*), or the average profit to be made by the use of the chattel (*s*); but in the case in which these suggestions were made by the judges, it was thought that in an action for non-delivery of a ship, the damages were not too high which gave the difference between the profits which the ship would have made if she had been duly delivered when freights were high, and the profits she earned when delivered some months later, when freights

(*r*) *Jervis, C. J., Fletcher v. Taylor*, 17 C. B. 27; 25 L. J. 66, C. P.

(*s*) *Willes, J.*, 17 C. B. 29; 25 L. J. 66, C. P.

were low. But this doctrine seems to trespass on that of *Hadley v. Baxendale*, since the subsequent fall of freights can scarcely be considered to have been contemplated by the parties, at the time when they contracted, as a probable or natural result of a breach, or to be within the usual course of events; and the limit, also, to such damage appears to be too remote (*t*).

In equity it has been suggested that the measure of damages for the wrongful detention of a chattel, is the profit which would have arisen from the user of the chattel, provided there be evidence that some particular, and not merely a contingent or general, user has been interrupted; as where a ship has been prevented from proceeding on a particular voyage, the contingent and probable profits of that voyage may be given. In such a case, it may be remarked, that the wrong assumes a character of wilfulness, which would justify exemplary damages (*u*). But this doctrine, it is submitted, cannot be extended to ordinary breaches of contract or cases of negligence.

The doctrine of *Hadley v. Baxendale* has been maintained firmly in all subsequent cases as law. Thus, a plaintiff had agreed to repair a steam thrashing machine for S., and had employed the defendant to repair a fire-box forming part of it. The defendant failed to do the repair within the fixed time; and when he had completed it, the fire-box proved to be worthless. S. sued the plaintiff for non-performance of the contract between them; and the plaintiff compromised the action (which arose entirely out of the defendant's negligence), by paying S. twenty pounds. Then the plaintiff sued the defendant, and claimed the sum paid to the defendant for repairs; the price which the plaintiff had paid for a new box; and also the twenty pounds he had paid S. The first two sums were not disputed; but the court held that the plaintiff was not entitled to the latter, as the defendant knew nothing about the plaintiff's

(*t*) See *Smeed v. Foord*, *infra*; 28 L. J. 178, Q. B.

(*u*) *De Mattos v. Gibson*, 30 L. J. 145, Chan., V. C. Wood.

contract with S. until long after the defendant had broken his contract with the plaintiff (*x*).

In this case there was nothing to fix the defendant with an actual or constructive knowledge of the necessary or probable special damage which the plaintiff would suffer from the breach of contract. In the following case there was such a constructive knowledge; and, therefore, the defendant was held to be liable to the full extent of such special damage. He had sold to the plaintiff under a warranty, as it seems, inferior seed barley as Chevalier seed barley. The plaintiff resold, under a similar warranty, to a third person, who sowed and received an inferior crop from the seed. The plaintiff had agreed to compensate his vendee, but had not fixed any sum. A sum of 26*l.* seems to have been found by the jury to be the sum which the plaintiff was liable to pay his vendee; and the court held, that the plaintiff was entitled to recover that sum from the defendant, who, when he warranted the seed to be good, must be held to have contemplated the loss which the failure of the crop was certain to cause to any purchaser or sub-purchaser of the seed, if it turned out to be bad seed (*y*).

Similarly, in a later case, the courts have shown no disposition to limit, but rather to extend, the doctrine of *Hadley v. Baxendale*. The plaintiff, a farmer, had contracted to buy a threshing machine from the defendant, who had undertaken to deliver it within a month. He was warned that if it were not delivered by a subsequent day—14th August—the plaintiff would have to hire one. The plaintiff was induced, by the defendant's promise, to wait still longer; and the plaintiff's corn was then subsequently damaged severely by rain. The court held the plaintiff entitled to recover the damage done to the wheat, and the cost of kiln-drying, as the natural consequence of

(*x*) *Portman v. Middleton*, 27 L. J. 231, C. P.

Q. B.; *Josling v. Irvine*, 30 L. J. 78, Exch.

(*y*) *Randall v. Roper*, 28 L. J. 266,

the defendant's breach of contract; but not, it seems, the loss arising from a fall in the market price of corn (z).

In *Gee v. Lancashire Railway* (a), the case was very similar to that of *Hadley v. Baxendale*: and the court accordingly held, that in an action for non-delivery of cotton within reasonable time, neither the loss of profit, by the mill being at a stand still for want of the supply; nor the wages which the plaintiff had to pay his servants while they were kept idle, while he was waiting for the cotton, could be included in the damages; as there were no circumstances from which it could be inferred, that these losses had been in the contemplation of the parties, when the contract of carriage was made, although it would have been otherwise, if there had been such an actual or constructive knowledge. In this case, Wilde, B., stated his concurrence with the opinion of Martin, B., that although a very excellent attempt was made in *Hadley v. Baxendale*, to lay down a rule of practice, it has been found, that that rule will not meet all cases, and that it may be found that, in many actions of contract, there is no rule of damages at all.

Where goods were not delivered till after the season for them had passed, it was held, that the measure of damages was the difference between the market value of them at the time of delivery, and the time when they ought to have been delivered; and that the plaintiff could not include anything for the loss of profits which he might have made by them, if they had been delivered at the proper time, and during the season (b).

The preceding cases appear to have limited materially, if they have not virtually abolished, the doctrine, for which there is still high authority (c), that a plaintiff, on a breach

(z) *Smeed v. Foord*, 28 L. J. 178, Q. B.

(a) 30 L. J. 11, Exch.

(b) *Wilson v. Lancashire and Yorkshire Railway*, 3 L. T. Rep. 859.

(c) *Waters v. Towers*, 8 Exch. 401; *Dunlop v. Higgins*, per Lord Cottenham, 1 H. of L. Cas. 403; *Josling v. Irvine*, 30 L. J. 78, Exch.

of contract, is entitled to recover damages arising out of his own inability to fulfil a contract, which he would have probably fulfilled, if the defendant had fulfilled his contract with the plaintiff. But the latest cases appear to settle clearly that mere inability to fulfil a sub-contract, arising out of the breach of contract on which damages are claimed, cannot be computed, unless the defendant knew actually, or constructively, of the sub-contract at the time when he entered into his contract with the plaintiff (*d*).

Where any portion of the assigned damage is attributable to the plaintiff's own negligence, he cannot claim compensation for it. Thus, where he booked through to a town on a railway, and was forced to stop at an intermediate place, because the defendants had no train to forward him, as contracted for, to the end of his journey; he was held to be entitled only to his hotel expenses for the night, and railway fare to his destination next day; and not to special damage which he had sustained by failing to keep appointments with his customers. *Martin, B.*, even doubted whether he could claim his hotel expenses. In this case the damage was limited to inevitable pecuniary loss, and by the consideration, that the plaintiff ought to have taken a post-chaise to his destination, and charged it to the defendants (*e*). So, even where the carrier detained the plaintiff's goods wrongfully; but the plaintiff might have had them by paying an illegal claim; the court thought, that although he was not bound to pay and sue the carrier subsequently for repayment, yet the jury might fairly consider the whole conduct of the parties, and whether the plaintiff's perversity had contributed to the damage. They held, also, that the measure of damages in such a case was not necessarily the amount of

(*d*) *Caledonian Railway Company v. Hare*, 29 L. J. 143, C. P.
v. Cole, 3 L. T. Rep. 252, H. of L.; (*e*) *Hamlen v. Great Northern*
Prior v. Wilson, 8 W. R. 260; *Spark Railway*, 1 H. & N. 408; 26 L. J.
v. Heslop, 28 L. J. 197, Q. B.; *Dingle* 20, Exch.

the sum demanded unlawfully (*f*). In short, pervading all the cases, the common law doctrine seems to hold, that a plaintiff's claim to compensation will be measured materially by his ability to compensate himself; and any omission to do so will have the effect of reducing the damages: as where sold goods are not duly delivered, the vendee can recover only the difference between the contract price and market price of them (*g*).

Where a carrier is sued for damages, arising out of his negligence, they will be measured according to the rule in *Hadley v. Baxendale*; for it seems to be settled that, in wrongs of negligence, as in breaches of contract, the recoverable damages must be the natural, proximate and necessary results of the breach of duty (*h*). For every breach of duty, nominal damages at least must be given (*i*). The guiding principle of assessment must be taken to be the principle of compensation; but juries are not bound by this principle so strictly in assessing damages, issuing out of wrong, as in assessing those which issue out of contract. Where there is no certain measure of damages in actions of wrong, the jury must be left to their common sense in the application of the above principle; and the court will not disturb their verdict (*k*). In a railway accident, where the plaintiff's eye was injured by collision, and negligence of the defendants, and affected with chronic inflammation, which was likely to impair the sight permanently, Lord Campbell, C. J., left it to the jury to say what was the fair amount of damages; and they gave the plaintiff 500*l.* (*l*). Where the plaintiff had been given into custody, on a charge which proved unfounded, that he

(*f*) *Davis v. London and North-Western Railway*, 7 W. R. 105.

(*g*) *Gainsford v. Carroll*, 2 B. & C. 624.

(*h*) *Walker v. Goe*, 28 L. J. 184, Exch.; *Richardson v. Dunn*, 30 L. J. 44, C. P.; *Collins v. Cave*, 30 L. J. 55, Exch., Sc. Cam.

(*i*) *Crompton, J., Fray v. Vowles*, 28 L. J. 232, Q. B.

(*k*) *Day v. Holloway*, 1 Jur. 794; *Williams v. Currie*, 1 C. B. 841.

(*l*) *Plant v. Oxford and Worcester Railway*, *Sittings after Hil. T.* 1856, at Westminster, Times, Feb. 5, 1856.

had not paid his fare, and was taken, without delay, before a magistrate, by whom he was discharged, 50*l.* were held to be liberal, but not excessive damages (*m*).

Where the wrong assumes a malicious character the jury may award exemplary or vindictive damages; as if a railway carrier, to obtain a monopoly, or to injure another carrier, refuse to carry goods which he is bound at law to carry (*n*); and they are at liberty to take into consideration the injury to the party's feelings, and the pain he has experienced, as, for instance, the extent of violence in actions of tort; and many topics and many elements of damage find place in an action of tort, which certainly have no place whatever in an ordinary action of contract (*o*).

When the damage arises out of simple negligence, especially if it be not of a gross character, the jury ought to attend strictly to the question of mere pecuniary compensation; although, even in these cases, the courts are unwilling to fetter the discretion of juries (*p*). But where a jury gave the plaintiff 200*l.* as damages for the loss, which they found he had suffered in his trade, by the refusal of the defendants to carry for him according to their duty as common carriers, the damages were held to be too remote, and not recoverable (*q*). And in such cases the jury ought to consider whether any portion of the damage is due to the plaintiff's own negligence; and whether he might have avoided it by his prudence; as by not insisting too punctiliously on his legal rights. The jury will look to all the circumstances, and say in what way the damage is to be apportioned between the parties (*r*).

(*m*) *Goff v. Great Northern Railway*, 30 L. J. 148, Q. B.

(*n*) *Crouch v. Great Northern Railway*, 25 L. J. 137, Exch.; *Bell v. Midland Counties Railway*, 4 L. T. Rep., N. S. 293.

(*o*) *Pollock, C. B., Hamlen v. Great Northern Railway*, 26 L. J. 20, Exch.; cf. *Robin v. Steward*, 23 L. J.

148, C. P.

(*p*) *Duckworth v. Johnson*, 29 L. J. 25, Exch.

(*q*) *Crouch v. Great Northern Railway*, 25 L. J. 137, Exch.

(*r*) *Davis v. London and North-Western Railway*, 7 W. R. 105; *Emblin v. Myers*, 30 L. J. 71, Exch.; cf. *supra*, p. 227.

On a policy of insurance, guaranteeing a certain sum in the event of injury by a railway accident, the damages are confined to compensation for bodily pain and suffering, and the amount of the medical attendant's bill; and damages, for loss of time and profits, are not recoverable (*s*). In such a case it has been said, that "it is unmanly, though undoubtedly legal, to claim damages for pain and suffering" (*t*); but juries may consider the profits which a person would have made in his trade or profession, if the accident had not occurred, and may give compensation accordingly (*u*).

The same principles apply to actions, for compensating the families of persons killed by accident, under 9 & 10 Vict. c. 93. By the second section of that act "in every such action the jury may give such damages as they may think proportionate to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought." In these cases "the measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family" (*v*). The damages are confined to injuries of which a pecuniary estimate can be made; and the jury must not consider the mental sufferings of a plaintiff, *e. g.*, of a wife for the loss of her husband (*x*), or of a parent for his child (*y*). Legal liability is not the only measure of such damages (*z*); but the jury may take into account a reasonable expectation of pecuniary advantage which the plaintiff might have derived from the prolonged life of the deceased, and the probable pecuniary loss which the plaintiff has sustained by the death; and the court will not be sedulous to reduce damages in such cases (*a*). Neither funeral expenses, nor

(*s*) *Theobald v. Railway Assurance Company*, 10 Exch. 45; 23 L. J. 249, Exch.

(*t*) Per Pollock, C. B., *ibid*.

(*u*) Cf. *De Mattos v. Gibson*, 30 L. J. 146, Chan., V. C. Wood.

(*v*) Per cur. *Blake v. Midland*

Railway, 21 L. J. 237, Q. B.

(*x*) *Ibid*.

(*y*) *Duckworth v. Johnson*, 29 L. J. 25, Exch.

(*z*) *Franklin v. South-Eastern Railway*, 6 W. R. 573; 3 H. & N. 211.

(*a*) *Ibid*.

mourning can be allowed (*b*). The jury ought not to calculate the life of the deceased by the annuity tables; but should give reasonable compensation according to the circumstances, and without reference to the feelings of surviving relations (*c*); for the object of the act is to compensate the families of deceased persons, and not to solace their feelings (*d*).

When the action is for negligence, which has caused the death of a man's wife, he is entitled to damages for the loss of her society, and the distress of mind which he has suffered on her account from the time of the accident up to the moment of her dissolution; but his damages stop with the period of her existence (*e*).

Costs.

The right to costs in actions by and against carriers depends on several statutes.

1. Costs in the Superior Courts, independently of the County Courts Acts.

By the Statute of Gloucester, 6 Edw. 1, c. 1, a plaintiff in an action is entitled to recover his costs in all cases in which he recovers damages; and, by 4 Jac. 1, c. 3, a defendant is similarly entitled, if judgment be for him; or if the plaintiff be nonsuited; in all cases in which the plaintiff may have costs, if judgment had been for the plaintiff.

But whether the action be in contract or in tort, the plaintiff can recover no more costs than damages, if the action be in a superior court, and if the damages be under 40s., and the judge certifies to that effect (*f*). A larger restriction exists when the action is in the superior court,

(*b*) *Dalton v. South-Eastern Railway*, 4 C. B. 296; 27 L. J. 227, C. P.

(*c*) *Armsworth v. South-Eastern Railway*, 11 Jur. 759.

(*d*) Per Coleridge, J., 21 L. J. 223, Q. B.

(*e*) Per Lord Ellenborough, *Baker v. Bolton*, 1 Camp. 493.

(*f*) 43 Eliz. c. 6, s. 2.

and is trespass, or trespass on the case: for then, if the damages be less than 40s., the plaintiff can have no costs whatever, unless the judge, immediately after the trial, certify on the back of the record that the action was brought to try a right, besides the mere right to recover damages for the trespass; *or* that the trespass was wilful and malicious (*g*). This restriction is again enlarged in all actions for alleged wrong in any of the superior courts: for in such cases, by a very recent statute, the plaintiff is not entitled to recover any costs whatever, when the verdict is for less than 5*l.*, if the judge before whom the verdict is obtained, “shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was not really brought to try a right, besides the mere right to recover damages; *and* that the trespass or grievance, in respect of which the action was brought, was not wilful and malicious; *and* that the action was not fit to be brought (*h*). This section applies to actions tried after, although commenced before, the act came into operation (*i*).

The effect of these enactments, considered irrespectively of the several County Courts Acts, which will be noticed secondly, appears to be that:—

- a.* In all actions, which can be brought by or against carriers in the superior courts, a plaintiff, recovering less than 40s., will have his full costs, unless the judge certifies to deprive him of them. When the verdict is for more than 40s., the plaintiff will have his costs in all actions of contract.
- b.* In trespass, or negligence, he will not have any costs if the verdict be for less than 40s., unless the judge, immediately after the trial, certify on the back of the record that the action was brought to try a right, besides the mere right to recover damages; *or* that the trespass was wilful and malicious.

(*g*) 3 & 4 Vict. c. 24, s. 2.

(*i*) Wright v. Hale, 30 L. J. 40,

(*h*) 23 & 24 Vict. c. 126, s. 34.

Exch.

c. Where in such cases, or in any alleged wrong, the plaintiff recovers less than 5*l.*, the plaintiff will not have any costs, if the judge certify that the action was not brought to try a right besides the right to recover damages, and that the trespass or grievance was not wilful and malicious; and that the action was not fit to be brought.

In order that the plaintiff may have his costs under *b*, the judge must certify for him. In order to deprive him of them under *c*, the judge must certify against him. An omission of the judge to certify under *b*, will deprive the plaintiff of his costs; an omission, under *c*, will give him his costs.

The certificate, under both *b* and *c*, must be given, as it seems, "within such a reasonable time as will exclude the danger of intervening facts operating upon the mind of the judge so as to disturb the impression made upon it by the evidence in the cause" (*k*). The certificate under 43 Eliz. c. 6, may be given later (*l*).

2. *Costs as affected by the County Courts Acts.*

If the plaintiff in any action of covenant, debt, detinue, or assumpsit, commenced in any one of the superior courts, and not being an action for breach of promise of marriage, recover a sum not exceeding 20*l.*; or in trespass, trover, or case, a sum not exceeding 5*l.*: he shall have judgment to recover such sum only and no costs, except in the case of judgment by default (*m*); or, unless the judge certify, on the back of the record, that the cause of action was one which could not have been brought in a county court, or that there was a sufficient reason for bringing the action in the superior court (*n*). If the judge so certify, the plaintiff shall have the same judgment to recover his costs,

(*k*) Per Lord Abinger, C. B., *Richardson v. Barnes*, 4 Exch. 128.
Thompson v. Gibson, 8 M. & W. 287. (*m*) 13 & 14 Vict. c. 61, s. 11.
 (*l*) *Holland v. Gore*, 3 T. R. 38; (*n*) *Ibid* s. 12.

as if the statute had not passed (*o*). In order to deprive the plaintiff of his costs under this act, it is not necessary to enter any suggestion on the record (*p*).

To these enactments there are statutory exceptions : and, notwithstanding the 13 & 14 Vict. c. 61, s. 11, a successful plaintiff may still have his costs, whether there be a verdict in the action or not, if he satisfy the court in which the action was brought, or a judge at chambers, that the action was brought for a cause in which concurrent jurisdiction is given by 9 & 10 Vict. c. 95, s. 28 ; viz., either that

- a.* The plaintiff dwells more than twenty miles from the defendant (*q*), as the crow flies (*r*) ; or that
- b.* The cause of action did not arise wholly, or in some material point, within the jurisdiction of the court, within which the defendant dwelt, or carried on his business, at the time of the action brought ; or that
- c.* An officer of the county court is a party to the action (*s*) ; or that
- d.* No plaint could have been entered in any county court (*t*) ; or that
- e.* The action was removed from a county court by certiorari (*u*) ; or that
- f.* There was sufficient reason for bringing the action in the court in which the action was brought (*x*).

In all, or any, of these six cases, the court or judge shall, by rule or order, direct that the plaintiff shall have his costs, as if the 13 & 14 Vict. c. 61 had not been passed (*y*). Hence, if a judge refuse to certify under the 13 & 14 Vict. c. 61, s. 12, a plaintiff may still recover his costs by bringing his case within one of the cases which are denominated by the 15 & 16 Vict. c. 54, s. 4.

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| (<i>o</i>) 13 & 14 Vict. c. 61, s. 12. | (<i>s</i>) 15 & 16 Vict. c. 54, s. 4 ; 9 & |
| (<i>p</i>) Ibid. s. 11. | 10 Vict. c. 95, s. 128. |
| (<i>q</i>) 9 & 10 Vict. c. 95, s. 128. | (<i>t</i>) 15 & 16 Vict. c. 54, s. 4. |
| (<i>r</i>) <i>Lake v. Butler</i> , 5 E. & B. 92 ; | (<i>u</i>) Ibid. |
| 24 L. J. 273, Q. B. ; <i>Jewell v. Stead</i> , | (<i>x</i>) Ibid. |
| 25 L. J. 294, Q. B. ; cf. <i>Duignan v.</i> | (<i>y</i>) Ibid. |
| <i>Walker</i> , 28 L. J. 867, Ch., V. C. Wood. | |

When a plaintiff, in an action of contract, sues in a superior court for a sum not exceeding 20*l.*, and the defendant suffers judgment by default, the plaintiff can have no costs, unless by leave of the court or a judge (z).

Under this clause a plaintiff, in an action for the loss of goods against a common carrier, who suffers judgment by default, is still entitled to his costs, as the action is founded on the breach of the defendant's common law duty, independently of contract (a). Where the judgment was for less than 20*l.*, and it appeared that the goods were delivered by a carrier, who was to be paid by the plaintiff, to the defendant at his residence, it was held, that the cause of action arose within the district in which the residence was (b).

Under the 9 & 10 Vict. c. 95, s. 128, and 15 & 16 Vict. c. 54, s. 4, a body corporate may be sued, and be liable to costs, and may "dwell;" and a railway company is deemed to dwell at its principal office, and not at every station along the line. Therefore, in an action against the Great Western Railway Company, where the plaintiff dwelt more than twenty miles from Paddington, he was held entitled to his costs (c). Where goods were to be carried from London to Newcastle, and were lost on the way; it was held, that the superior court in London had concurrent jurisdiction, as the delivery at Newcastle was to be to the agents, and not to the servants of the defendants at Newcastle; and that therefore the cause of action could not be regarded as having arisen within the Newcastle district (d).

The limits of this treatise preclude a more extended treatment of the subject of costs; and it is enough to refer to Gray on Costs; see also the London Small Debts

(z) 19 & 20 Vict. c. 108, s. 30.

(a) *Tatton v. Great Western Railway*, 29 L. J. 184, Q. B.; cf. *Legge v. Tucker*, 26 L. J. 71, Exch.

(b) *Arndt v. Porter*, 30 L. J. 19, Exch.

(c) *Adams v. Great Western Rail-*

way Company, 30 L. J. 124, Exch.; *Taylor v. Crowland Gas and Coke Company*, 24 L. J. 233, Exch.

(d) *Corbett v. General Steam Navigation Company*, 28 L. J. 214, Exch.; *Shiels v. Great Northern Railway*, 4 L. T. Rep., N. S. 479.

Act, 15 Vict. c. 78 (*e*), and the Malicious Trespass Act, 7 & 8 Geo. 4, c. 30, s. 22 (*f*).

On an appeal from a county court, where the superior court orders a new trial on the ground of misdirection, the appellant will not have the costs of the appeal (*g*).

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|---|---|
| (<i>e</i>) Hede v. Atlantic Steam Com- | Exch. |
| pany, 29 L. J. 191, Q. B. | (<i>g</i>) Gee v. Lancashire Railway, |
| (<i>f</i>) Norwood v. Pitt, 29 L. J. 127, | 30 L. J. 11, Exch. |

CHAPTER XII.

ON RAILWAY CARRIERS.

THE general duties, liabilities, and rights of railway carriers were originally, and still in a great measure actually are, co-extensive with those of other land carriers; and they are regulated by the same common law principles, except when these are controlled by statute. But the gradual absorption of the ancient modes of land carriage, in one general system of railway conveyance, has induced the legislature not only to regulate the management of particular railways by the terms of the special acts by which many of them are incorporated; but to pass several acts which apply exclusively, but equally, to all railway carriers. It is not proposed in this chapter to treat of the constitution of railway companies, nor to investigate the cases which have been decided on the peculiar language of numerous private acts; but to state clearly the general principles by which railway carriers are distinguished from other land carriers.

It will have been observed, during the course of this treatise, that most of the recent cases on the law of carriers have been cases of railway carriage; and much, therefore, of the law, which it would otherwise be necessary to discuss in this chapter, may be considered as having been already sufficiently treated and defined. But it may also be desirable to recapitulate a few fundamental principles.

Railway carriers may be either common or special carriers; in other words, they may become, either expressly or constructively, liable as insurers by carrying goods regularly from one place to another; or they may ge-

nerally limit their liability by means of a special contract ; with the statutory exception, that, unlike other land carriers, they cannot, even by express contract, exempt themselves from liability for gross negligence. Most railway carriers are empowered, either by their special acts, or by the Railways Clauses Consolidation Act, to become common carriers ; and, when they have apparently acted as such, they are presumed to be so.

Thus, where a railway was empowered by its act to carry and convey passengers and goods, it was held, that the fact of the company having acted on this authority constituted them presumptively common carriers. Parke, B., said : " If the company choose to carry, and do not take care to accept the goods with a limited responsibility, then the question is, whether the common law duty is not cast upon them ; and I am of opinion that it is." And his Lordship held, that they were subject to all the liabilities of common carriers (*a*). But when a railway company acts as carriers under such an act, or under the Railways Clauses Act, its duties and liabilities are not greater than those of other land carriers. The company is bound only to carry such goods as they are in the habit of carrying ; and may limit their liability, or refuse to carry goods, either altogether, or within any division of the transit through which they have not professed to carry. So they may refuse to carry if they have not conveyances ; or, after having professed to carry any particular kind of goods, they may discontinue the business (*b*). And before they can be sued as common carriers for refusing to carry goods, it must appear by clear evidence that they have held themselves out as such from and to the several termini. Thus, where the defendants had posted up at a station a list of tolls for conveying different articles, including coals ; but there was no proper accommodation for the reception of

(*a*) *Palmer v. Grand Junction Company*, 4 Exch. 367 ; 18 L. J. Railway, 4 M. & W. 768. 366, Exch.

(*b*) *Johnson v. Midland Railway*

coals at the station; nor did it appear that they had acted on the notice as to coals at that station: it was held, that there was not sufficient evidence to show that the defendants had held themselves out as carriers of coal from that station. Erle, C. J., said: "It is the duty of a common carrier to carry in accordance with the conditions which he holds out to the public; but when such conditions do not restrict him, he has an option as to the method in which he will conduct his business. He may carry coals from a particular station only, and other articles from other stations only, as may suit his convenience" (c).

Where a railway company has been incorporated since the 8th May, 1845, it is subject to the 8 Vict. c. 20 (Railways Clauses Consolidation Act), the clauses and provisions of which are declared by the first section to be incorporated with the railway's special act, except so far as they are expressly varied or excepted by any such act. Generally, these acts are framed in language similar to that of the Railways Clauses Consolidation Act. But whenever it is sought to know the exact terms and extent of the duties and rights of railway carriers, reference must be made to the special act; a copy of which the company is bound (d) to keep for public inspection in their principal office of business; and to deposit another copy, for the same purpose, with the clerk of the peace for every county through which the railway passes. Such acts are construed strictly against the persons obtaining them, and liberally in favour of the public (e). The principles and general constitution of railway carriage, as regulated by public statutes, will now be stated.

One of the earliest acts, 1 & 2 Vict. c. 98, enables the Postmaster-General to require all railways to convey the public mails for a reasonable rate of charge. It is sufficient

(c) *Oxlade v. North-Eastern Railway*, 9 W. R. 272; 3 L. T. Rep., N. S. 671; cf. *Erle, J., M'Manus v. Lancashire Railway*, 28 L. J. 351,

Exch., Sc. Cam.

(d) 8 Vict. c. 20, s. 162.

(e) See *Cases, Chitty's Statutes*, Vol. 3, p. 956, n.

to refer to this act (and see also 7 & 8 Vict. c. 85, s. 11), as well as to the 5 & 6 Vict. c. 55, s. 20, by which railways may be required to convey troops and military stores at prices to be fixed by the Secretary of State: (see also 7 & 8 Vict. c. 85, s. 12, and 10 & 11 Vict. c. 85,) but not at the same rate as an ordinary passenger train (*f*).

Since the 18th August, 1846, it is not lawful (with a few exceptions) to construct any railway for the conveyance of passengers on any gauge other than four feet eight inches and a half in Great Britain, and five feet three inches in Ireland; but railways, constructed previously on a different gauge, may be still maintained on that gauge (*g*). A general supervision of all railways is given to the Board of Trade, who may call for returns of the aggregate traffic in passengers, cattle and goods, as well as of all accidents, attended with personal injury, on the railway: and also for tables of all tolls, rates, and charges levied from time to time on such traffic (*h*). The Board may appoint persons to inspect the railway, and all works and engines connected with it, at all reasonable times (*i*). All bye-laws, before they can operate, must have been laid, for two months previously, before the Board, who may disallow any such bye-law at any time before, or after, it shall have come into operation (*k*). Prosecutions may be directed by the certificate of the Board against the company for any offence against any of the railway acts, within one year after such offence shall have been committed (*l*): such prosecution being directed by the Board to the Attorney-General for England or Ireland, or Lord Advocate for Scotland (*m*). Any officer or agent of the railway company may "seize and detain any engine driver, guard, porter, or other servant in the employ of the company, who shall be found drunk while

(*f*) R. v. Irish South-Eastern Railway, 1 Ir. L. R., N. S. 29.

(*g*) 9 & 10 Vict. c. 57, s. 1.

(*h*) 3 & 4 Vict. c. 97, s. 1; 14 & 15 Vict. c. 64.

(*i*) 3 & 4 Vict. c. 97, s. 5; 7 & 8 Vict. c. 85, s. 15.

(*k*) 3 & 4 Vict. c. 97, ss. 8, 9.

(*l*) Ibid. s. 12.

(*m*) 7 & 8 Vict. c. 85, s. 17.

employed upon the railway or commit any offence against any of the bye-laws, rules, or regulations of the company; or who shall wilfully, maliciously, or negligently do or omit to do any act whereby the life or limb of any person passing along or being upon the railway or the works thereof shall be or might be injured or endangered, or whereby the passage of any of the engines, carriages, or trains shall be or might be obstructed or impeded" (*n*). Any such person so apprehended, or any person counselling or aiding him, may be conveyed, with all convenient despatch, before a justice of the peace without warrant, and may be imprisoned, with or without hard labour, for not more than two calendar months; or be fined not more than ten pounds, and be imprisoned, with or without hard labour, in default of payment (*o*): or the magistrate may send the case to the quarter sessions (*p*). Any person wilfully doing, or causing to be done, anything to obstruct any engine or carriage, or to endanger the safety of persons conveyed in the same, or who shall aid therein, is guilty of a misdemeanor, and, on conviction, may be imprisoned, with or without hard labour, for two years (*q*). Any person wilfully trespassing on a railway, or obstructing any officer of the railway, may also be seized and detained until he can be conveniently taken before a magistrate of the district, who may fine him five pounds; and, in default of payment, the offender may be imprisoned for not more than two calendar months, with or without hard labour (*r*).

No railway, nor portion of any railway, may be opened for public conveyance, until after one calendar month's notice in writing to the Board of Trade, of the company's intention to open the railway; nor until after ten days' notice to the Board, of the time when the railway will be complete and fit for inspection (*s*). The Board may post-

(*n*) 3 & 4 Vict. c. 97, s. 13; 5 & 6
Vict. c. 53, s. 17.

(*q*) Ibid. s. 15.

(*r*) Ibid. s. 16.

(*o*) 3 & 4 Vict. c. 97, s. 13.

(*s*) 5 & 6 Vict. c. 55, s. 4.

(*p*) Ibid. s. 14.

pone the opening, if, after inspection, they think it right to do so (*t*). Notice of every accident, attended with serious personal injury, must be given by the company to the Board within forty-eight hours after its occurrence (*u*). Whenever a railway crosses a turnpike, highway, or statute labour road, the directors of the railway must keep gates at each end of the road, where it crosses, at all times closed, except when the railway carriage or engines are crossing the road (*x*); and every train must slacken speed before arriving at such road, and not cross it at any greater rate of speed than four miles an hour (*y*). The Board may decide all questions between companies with a common terminus or line of rails, so far as such questions affect the safety of the public (*z*).

No railway shall be considered a passenger railway if two-thirds or more of the gross annual revenue of such railway shall be derived from the carriage thereon of coals, ironstone, or other metals or minerals (*a*). Carriages of greater weight than four tons may be used (*b*).

By a recent and important act any two or more railway companies may, by writing under their common seals, agree to refer to arbitration any existing or future differences between such companies. It is sufficient to refer to this act (*c*).

The 7 & 8 Vict. c. 85, s. 6, requires all existing and future passenger railways to run at least one train on every week-day, except Christmas-day and Good Friday, each way, such exception not to extend to Scotland, from one end to the other of each trunk, branch, or junction line belonging to or leased by the company, "for the conveyance of third-class passengers, to and from the terminal and other ordinary passenger stations of the railway, under the obligations contained in their several Acts of Parliament, and

(*t*) 5 & 6 Vict. c. 55, s. 6.

(*u*) Ibid. s. 7.

(*x*) Ibid. s. 9; cf. *Marfell v. South-Western Railway*, 29 L. J. 315, C. P.

(*y*) 8 & 9 Vict. c. 20, s. 48.

(*z*) Ibid. s. 11.

(*a*) 5 & 6 Vict. c. 55, s. 12.

(*b*) Ibid. s. 16.

(*c*) 22 & 23 Vict. c. 59.

with the immunities applicable by law to carriers of passengers by railways, and also under the following conditions: that is to say—

Such train shall start at an hour, to be from time to time fixed by the directors, subject to the approval of the Lords of the Committee of Privy Council for Trade and Plantations.

Such train shall travel at an average rate of speed not less than twelve miles an hour for the whole distance travelled on the railway, including stoppages.

Such train shall, if required, take up and set down passengers at every passenger station which it shall pass on the line.

The carriages, in which the passengers shall be conveyed by such train, shall be provided with seats, and shall be protected from the weather, in a manner satisfactory to the Lords of the said Committee.

The fare or charge for each third-class passenger by such train shall not exceed one penny for each mile travelled (*d*).

Each passenger by such train shall be allowed to take with him half a hundred weight of luggage, not being merchandize, or other articles carried for hire or profit, without extra charge; and any excess of luggage shall be charged by weight, at a rate not exceeding the lowest rate of charge for passengers' luggage by other trains.

Children under three years of age, accompanying passengers by such train, shall be taken without any charge; and children of three years and upwards, but under twelve years of age, at half the charge of an adult passenger.

(*d*) For fractions under one mile one penny may be charged; and for fractions exceeding half a mile, when the distance amounts to one mile or more, one halfpenny may be charged.

No rate shall be deemed excessive if it does not exceed one farthing for each entire quarter of a mile travelled (21 & 22 Vict. c. 75, ss. 1, 2; 23 & 24 Vict. c. 41).

The effect of this section was discussed in *The Great Northern Railway v. Shepherd* (e). That was an appeal from the decision of a county court judge; and the original plaintiff and his wife had travelled by an excursion train with goods, which were not personal luggage, but articles of merchandize above 56 lbs. in weight. It was held that, under the act, the husband and wife travelling together were entitled to 112 lbs. of personal luggage. But there was no evidence that the excursion train was subject to the regulations of ordinary third-class trains; but rather the contrary. It was held, therefore, that the company was only liable, as at common law, for the loss of the goods; that the fare for passengers included only personal luggage; and that as the goods had been delivered and carried ostensibly as luggage, when actually they were merchandize, the carrier was not liable. Parke, B., said: "The provision in the Act of Parliament is equivalent to notice that the company will carry with each passenger 56 lbs. of luggage, but not of merchandize;" and stated that the term luggage, "according to the true modern doctrine on the subject, comprises clothing, and such articles as a traveller usually carries with him for his personal convenience; perhaps even a small present, or a book for the journey, might be included in the term; but certainly not merchandize or materials bought for the purpose of being manufactured and sold at a profit." His Lordship remarked, during the case, that the mere fact of a passenger carrying more than the prescribed allowance would not exempt the carrier from liability, because it is strictly "his duty to weigh it;" but considered that he might have objected to carry it if he had suspected the goods to be merchandize.

A railway company is not bound to run more than one third-class train during the day under the above section;

(e) 8 Exch. 30; 24 L. J. 286, Exch.; cf. *Munster v. South-Eastern Railway*, 27 L. J. 308, C. P.

and the company may run any others for such distances only, and subject to such reasonable arrangements as they may think proper (*f*).

Pencil sketches of an artist in his portmanteau are not ordinary luggage, nor entitled to be conveyed as such free of charge (*g*); nor is a common carrier bound to allow dogs or other animals to be conveyed free of charge, nor even to carry them at all, at common law, unless he has professed to carry them (*h*).

By the 10th section it is provided, that, when a passenger railway company runs any train or trains on a Sunday, they shall provide third-class conveyances, on the above conditions, for the trains which stop each way at the greatest number of stations.

All railway companies are bound by the same act (s. 13) to allow any person authorized by the Board of Trade, to enter on the lands of the railway, for the purpose of laying down and working a line of electrical telegraph, of which the railway company is to have the full benefit, subject to the prior claims of her Majesty, and of the proprietors of the telegraph.

The provisions of the Railways Clauses Consolidation Act (8 Vict. c. 20), so far as they apply to carriers, may now be stated.

The 86th section enacts: "With respect to the carrying of passengers and goods upon the railway, be it enacted as follows:—

"It shall be lawful for the company to use and employ locomotive engines, or other moving power and carriages, and waggons to be drawn or propelled thereby, and to carry and convey upon the railway all such passengers and goods as shall be offered to them for that purpose,

(*f*) *Caterham Railway Company v. London and Brighton Company*, 26 L. J. 161, C. P.

(*g*) *Mytton v. Midland Railway Company*, 28 L. J. 385, Exch.

(*h*) *Harrison v. London and Brighton Railway*, 29 L. J. 209, Q. B.

and to make such reasonable charges in respect thereof as they may from time to time determine upon, not exceeding the tolls by the special act authorized to be taken by them."

This section, as stated above, does not compel railways to become carriers, but enables them to act as such (*h*).

Sect. 89. "Nothing in this or the special act contained shall extend to charge or make liable the company further or in any other case, than where, according to the laws of the realm, stage-coach proprietors and common carriers would be liable, nor shall extend in any degree to deprive the company of any protection or privilege which common carriers or stage-coach proprietors may be entitled to; but, on the contrary, the company shall at all times be entitled to the benefit of every such protection and privilege."

The effect of this section is to give railway carriers the rights and privileges of carriers at common law, and under the Carriers' Act; but it will be seen that this principle is again restricted by the 17 & 18 Vict. c. 31.

Sect. 87 empowers railways to contract with other companies for the passage of engines, carriages, &c., and apportions the tolls between the companies. Sects. 98—102 refer to the general calculation of tolls. These sections will be given in the Appendix.

The following sections are important:—

Penalty for fraud on the Company.

Sect. 103. "If any person travel, or attempt to travel, in any carriage of the company, or of any other company or party using the railway, without having previously paid his fare, and with intent to avoid payment thereof; or if any person, having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance, without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof; or if any person knowingly and

(*h*) *Johnson v. Midland Railway*, 4 Exch. 367.

wilfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit such carriage, every such person shall for every such offence forfeit to the company a sum not exceeding forty shillings."

Sect. 104. "If any person be discovered either in or after committing, or attempting to commit, any such offence as in the preceding enactment mentioned, all officers and servants, and other persons on behalf of the company, or such other company or party as aforesaid, and all constables, gaolers and peace officers, may lawfully apprehend and detain such person, until he can conveniently be taken before some justice, or until he be otherwise discharged by due course of law." If the passenger pays the fare demanded of him for a longer distance, he cannot be apprehended for nonpayment of a higher fare for a shorter distance, although he was aware that the charge for the shorter distance was more than for the longer distance (*i*).

Under these sections a railway company has no power to apprehend a passenger for refusing to deliver up his ticket, under a bye-law empowering the company to recover the fare on such a refusal by proceeding before a magistrate (*j*): and it appears, generally, that if the fare has been paid, the company will be liable to an action for false imprisonment, if they apprehend a passenger merely on the ground that he refuses, or omits, or is unable to give up his ticket when it is demanded from him (*k*). In such cases an action either for false imprisonment (*l*), or for assault and battery (*m*), or for any negligent or malicious wrong (*n*), according to the circumstances, but not for a malicious prosecution (*o*), will

(*i*) *R. v. Frere*, 24 L. J. 68, M. C.

(*j*) *Tollemache v. London and South-Western Railway*, 26 L. T. Rep. 222.

(*k*) *Eastern Counties Railway v. Broom*, 6 Exch. 314; 20 L. J. 196, Exch.; *Goff v. Great Northern Railway*, 30 L. J. 148, Q. B.

(*l*) *Roe v. Birkenhead Railway*, 7 Exch. 36; 21 L. J. 9, Exch.

(*m*) *Eastern Counties Railway v. Broom*, *supra*.

(*n*) *Green v. London General Omnibus Company*, 24 L. J. 13, C. P.

(*o*) *Stevens v. Midland Railway*, 10 Exch. 352; 23 L. J. 328, Exch.

lie against a railway company, although a corporation, for the act of their servant, if there be evidence that the servant was acting under the express or implied authority of the railway company (*p*), or that the company subsequently ratified his act (*q*). But unless there be sufficient evidence of such authority, no such action will lie against a company (*r*). Where a bye-law enacts, that a passenger shall produce his ticket when required so to do by any officer or servant of a company, and provides a penalty for refusal to produce it; a conviction under the bye-law for non-production is good, even against an annual ticket holder, although he be under a special contract with the company to produce it when required (*s*).

Where an act gives power to make bye-laws and impose penalties, recoverable summarily before a magistrate, for a breach, and subsequently gives power to apprehend for an offence against *the act*, it appears that there is no power to apprehend for a breach of a bye-law (*t*).

Railways may refuse to carry certain goods.

Sect. 105. "No person shall be entitled to carry, or to require the company to carry, upon the railway any aquafortis, oil of vitriol, gunpowder, lucifer matches, or any other goods which in the judgment of the company may be of a dangerous nature; and if any person send by the railway any such goods, without distinctly marking their nature on the outside of the package containing the same, or otherwise giving notice in writing to the book-keeper, or other servant of the company, with whom the same are left at the time of so sending, he shall forfeit to the company twenty pounds for every such offence; and it shall

(*p*) *Goff v. Great Northern Railway*, supra.

(*q*) *Eastern Counties Railway v. Broom*, supra.

(*r*) *Roe v. Birkenhead Railway*,

supra.

(*s*) *Woodard v. Eastern Counties Railway*, 4 L. T. Rep., N. S. 336.

(*t*) *Chilton v. London and Croydon Railway*, 16 M. & W. 212.

be lawful for the company to refuse to take any parcel that they may suspect to contain goods of a dangerous nature, or require the same to be opened to ascertain the fact."

The latter part of this section, conferring the right to open goods *suspected* to be of a dangerous character, gives a railway carrier a privilege which has only a doubtful existence at common law ; but it does not authorize him to open goods for the purpose of estimating charges, &c. (*u*).

Independently of this statute, railway and other carriers are irresponsible, at common law, for damage which may happen to goods of a destructive or peculiarly perishable nature, if it be not communicated to the carrier at the time of the consignment to him (*x*); and the sender is also civilly, although not criminally, responsible to the carrier for the former act. But when a railway act imposes a penalty for sending such goods by the railway, without communicating their description, a guilty knowledge of the nature of the goods is necessary to a conviction (*y*). There seems to be no obligation on railway carriers to carry goods of a dangerous kind (*z*).

Railways have powers under the 8 Vict. c. 20, to make

Bye-laws.

Sect. 108. "It shall be lawful for the company, from time to time, *subject to the provisions and restrictions in this and the special act contained*, to make regulations for the following purposes (that is to say):

"For regulating the mode by which, and the speed at which, carriages using the railway are to be moved or propelled.

"For regulating the times of the arrival and departure of any such carriages.

(*u*) *Crouch v. London and North-Western Railway*, 14 C. B. 255; 23 L. J. 73, C. P.; 2 Car. & Kir. 389.

(*x*) *Hutchinson v. Guion*, 28 L. J. 63, C. P.

(*y*) *Hearn v. Garton*, 28 L. J. 216, M. C.

(*z*) *Johnson v. Midland Railway*, 4 Exch. 367; 18 L. J. 366, Exch.

- “ For regulating the loading or unloading of such carriages, and the weights which they are respectively to carry.
- “ For regulating the receipt and delivery of goods and other things which are to be conveyed upon such carriages.
- “ For preventing the smoking of tobacco, and the commission of any other nuisance, in or upon such carriages, or in any of the stations or premises occupied by the company.
- “ And generally, for regulating the travelling upon or using and working of the railway.
- “ But no such regulation shall authorize the closing of the railway, or prevent the passage of engines or carriages on the railway at reasonable times, except at any time when, in consequence of any of the works being out of repair, or from any other sufficient cause, it shall be necessary to close the railway or any part thereof.” (This latter provision refers to the statutory authority given by the act to the public to use their own carriages on the railway; but this power has not been exercised, and is practically inoperative (*a*).)

By the 8 & 9 Vict. c. 16, a company may make such bye-laws, as they may think fit, for the purpose of regulating the conduct of the officers and servants of the company, and for the due management of the affairs of the company, provided such bye-laws be not repugnant to the laws of the realm or of the company's special act: such bye-laws to be reduced into writing and sealed with the company's seal, and a copy thereof to be given to every officer and servant of the company affected thereby (*b*). The company may impose on all such officers and servants penalties not exceeding five pounds, recoverable before a magistrate (*c*); and, on such a proceeding, a written or printed copy of the bye-laws, under the company's seal, is

(*a*) See Parke, B., 18 L. J. 369,
Exch.

(*b*) Sect. 121.

(*c*) Sects. 125, 126.

sufficient evidence of such bye-laws (*d*). The offences for which such penalties are imposed must be painted on a board, or printed upon paper pasted thereon, which board must be hung up or affixed on some conspicuous part of the principal place of business of the company; and when the penalties are of local application, then in some conspicuous place in the immediate neighbourhood (*e*). As to the mode of recovering penalties, see the same act, ss. 145—160.

The 3 & 4 Vict. c. 97, sects. 7—9, directs substantially, that no bye-law of a railway, made by authority of an Act of Parliament, shall be valid until two months after a certified copy of it shall have been laid before the Board of Trade, which may either allow it, or disallow it, either immediately or at any subsequent time. With reference to this provision the 8 & 9 Vict. c. 20, s. 109, enacts that :—

“For better enforcing the observance of all or any of such regulations, it shall be lawful for the company, subject to the provisions of an act passed in the fourth year of the reign of her present Majesty . . . to make bye-laws, and from time to time to repeal or alter such bye-laws and make others, provided that such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special act; and such bye-laws shall be reduced into writing, and shall have affixed thereto the common seal of the company; and any person offending against any such bye-law shall forfeit for every such offence any sum not exceeding five pounds, to be imposed by the company in such bye-laws as a penalty for any such offence; and if the infraction or nonobservance of any such bye-law or other such regulation as aforesaid be attended with danger or annoyance to the public, or hindrance to the company in the lawful use of the railway, it shall be lawful for the company summarily to interfere to obviate

(*d*) Sect. 127.

(*e*) Sect. 145.

or remove such danger, annoyance or hindrance, and that without prejudice to any penalty incurred by the infraction of any such bye-law."

Sect. 110. "The substance of such last-mentioned bye-laws, when confirmed or allowed according to the provisions of any act in force, regulating the allowance or confirmation of the same, shall be painted on boards, or printed on paper and pasted on boards, and hung up and affixed, and continued on the front or other conspicuous part of every wharf or station belonging to the company, according to the nature or subject-matter of such bye-laws respectively, and so as to give public notice thereof to the parties interested therein or affected thereby; and such boards shall from time to time be renewed as often as the bye-laws thereon or any part thereof shall be obliterated or destroyed; and no penalty enforced by any such bye-law shall be recoverable unless the same shall have been published and kept published in manner aforesaid."

Sect. 111. "Such bye-laws, when so *confirmed, published, and affixed*, shall be *binding* upon and be *observed by all parties*, and *shall be sufficient to justify all persons acting under the same*; and for proof of the publication of any such bye-laws, it shall be sufficient to prove that a printed paper, or painted board, containing a copy of such bye-laws, was affixed and continued in manner by the act directed; and in case of its being afterwards displaced or damaged, then that such paper or board was replaced as soon as conveniently might be."

It appears from these sections, that, in order that a bye-law should be valid, it is necessary, first, that it be reasonable, and not repugnant to the common law, nor to any provision either of the Railways Clauses Act, or of the company's special act; secondly, that it have been confirmed by the Board of Trade, or other authority nominated by the special act; and thirdly, that it have been duly *published and affixed*, so as to give the public actual or constructive notice of its existence. When these conditions

have been satisfied, it appears certainly to have been the intention of the Legislature that the bye-laws should be held to be binding on all persons; and unless such a construction be adopted, it seems difficult to say what is the use or object of a bye-law.

On the first point there is no doubt, viz., that a bye-law must be reasonable, and not be opposed either to the common or statute law, and that it will be inoperative and void, although duly confirmed, if it be so opposed. Thus a power to make bye-laws is restricted closely within the original limits of the power; and a power to make bye-laws for certain specified purposes does not give a power to make bye-laws for other purposes (*f*). So, where a railway was empowered by its local act to make bye-laws for the good government of its affairs, with a power of imposing reasonable fines and forfeitures on persons offending against the same, and to arrest for nonpayment; and such bye-laws were to be binding upon and to be observed by all parties, provided they were not repugnant to the law of England; it was questioned, whether the company had power to make a bye-law, by which the fare from the place from which the train started originally was to be paid if the passenger did not produce his ticket when required: and it was held, that the nonproduction of the ticket did not involve such a penalty or forfeiture, as would authorize the company to arrest the passenger on his subsequent refusal to pay for the whole distance (*g*). So, where a railway company, under the Railways Clauses Act, made a bye-law, that every passenger should be subject to a penalty of 40s. if he entered the train without having previously paid his fare, or if he refused to show his ticket when required; it was admitted, that there was no question as to the validity of the bye-law; and Lord Campbell, C. J., said, that it was "an exceedingly reasonable bye-law;" although his Lordship said that he "cautiously abstained from expressing,

(*f*) *Child v. Hudson's Bay Company*, 2 P. Wms. 209.

(*g*) *Chilton v. London and Croydon Railway*, 16 M. & W. 212.

any opinion as to the *power* of the company to make special regulations or bye-laws, so as to enforce larger fares for shorter distances" (*h*). So even a regulation, not depending on a bye-law, by which certain persons are excluded arbitrarily from the company's premises at times when the public generally are admitted, is not void for unreasonableness, nor is it cause for an injunction (*i*). But, where a canal company was empowered to make bye-laws for the good government of the canal, and to impose reasonable fines on persons offending against the same; it was held that a bye-law closing the canal on Sundays, except on certain rare necessities and occasions, and imposing a fine of five pounds for a breach, was unreasonable, illegal, and void (*h*). And where a company, having powers under its special act to make bye-laws "for the good government of the affairs of the company, and for the management of the said undertaking," made a law that "every first-class passenger should be allowed to carry 112 lbs. of luggage free of charge; but that the company would not be responsible for the care of the same unless booked and the carriage thereof paid for;" the bye-law was held to be void, since it was in contravention of a clause in the same special act, by which the company were to be liable as common carriers, without extra charge, for articles of a certain weight and dimensions (*l*).

Where a bye-law was made under a local act for regulating the stands of hackney carriages, the bye-law was held good, although it did not specify distinctly the exact localities of such stands. In this case it was said, that "the old rule of law which says that a bye-law, bad in part is bad in the whole, is qualified to this extent, that if the good part be independent of and unconnected with the bad, the

(*h*) *R. v. Frere*, 24 L. J. 71, M. C.

(*i*) *Barker v. Midland Railway*, 25 L. J. 184, C. P.; *Beadell v. Eastern Counties Railway*, 26 L. J. 250, C. P.

(*k*) *Calder and Hebble, &c. Com-*

pany v. Pilling, 14 M. & W. 76.

(*l*) *Williams v. Great Western Railway*, 10 Exch. 15; cf. *Great Western Railway v. Goodman*, 12 C. B. 313.

good part would be valid and binding" (*m*). These cases clearly establish the principle, that a bye-law must be reasonable, consonant to law, and confined within the scope of the power to make bye-laws.

On the second point there is also no doubt, viz., that a bye-law must have been duly approved and confirmed by the Board of Trade, or other authority, before it can operate. But the third point, viz., as to the effect of publication, has been warped, apparently, from its literal and, it is submitted, its true construction by the authority of an eminent judge, whose incidental *dicta* are entitled to the most respectful consideration. The case is that of *The Great Western Railway v. Goodman* (*n*). There the company, by their special act, had powers to make bye-laws for the management of their railway, which were to be affixed and published at the different stations; and when so affixed and published, they were to be "binding upon and observed by all parties." The section of the special act corresponds substantially with that of the 111th section of the Railways Clauses Act. The validity of the bye-law was undisputed; but there was no evidence that the plaintiff knew actually of the existence of the bye-law, nor does there seem to have been distinct evidence of publication. Maule, J., is reported to have asked the counsel for the railway, "Can the bye-law have any effect on a plaintiff who is not shown to have had any notice of it?"

It may fairly be presumed that a learned judge, who never asked an unmeaning question, was not intending to raise a doubt as to the intention of an act, the language and spirit of which appear beyond the utmost subtlety of misapprehension; but that he was referring to the statement of the case on appeal, which does not appear to have found expressly that the bye-law was duly published, although it was agreed that it should form part of the case. But if it was intended to suggest that a bye-law, duly made and published, is not binding on a person who is not

(*m*) Blackpool Board of Health
v. Bennett, 4 H. & N. 127.

(*n*) 12 C. B. 313; 21 L. J. 197,
C. P.

shown to have had actual notice of it, it may be submitted, with respectful confidence, that such a construction is wholly opposed to the doctrine and principles of constructive notice as established in the analogous case of notices under the Carriers Act; and that the effect of it, if adopted, would be to render all otherwise valid bye-laws a dead letter. The *dictum* was also *obiter*, and does not appear to have been adopted by any other members of the court. But the principle which the case decided is the important one, that a bye-law, valid in other respects, may be rendered constructively nugatory and inoperative, if there be evidence that the company have not acted on it, and have shown no intention to treat it as operative.

In accordance with the above view, it has since been decided, that where it has been shown that a bye-law has been affixed, in the manner directed by this act, at the two stations respectively at which the passenger entered and left the carriage, there is sufficient proof of publication; and it is not necessary to prove that copies of the bye-law were affixed at every other station on the line. At the same time it was decided, that bye-laws, made under the 8 & 9 Vict. c. 20, ss. 108—111, are documents of a public nature, and proveable as such by examined or certified copies under 14 & 15 Vict. c. 99 (*o*).

Under some of the special railway acts notice of action must be given before any action can be brought for any personal injury to a passenger. But this is not generally necessary (*p*).

A railway ticket may be the subject of an indictment for larceny (*q*), or for obtaining a chattel by false pretences; although, in both cases, there may be an intent to return the ticket to the railway company at the end of the journey (*r*).

(*o*) *Motteram v. Eastern Counties* Rep. 233.

Railway, 29 L. J. 57, M. C.

(*q*) *R. v. Beecham*, 5 Cox, C. C.

(*p*) *Kent v. Great Western Rail-*

181.

way, 4 Railw. Cas. 699; *Garton v.*

(*r*) *R. v. Boulton*, 1 Den. C. C.

Great Western Railway, 31 L. T.

508; 19 L. J. 67, M. C.

It would be beyond the limits of this treatise to discuss minutely the constitution and management of railway companies (s). Their duties, liabilities, and rights, as carriers, have been discussed incidentally in the preceding chapters, and it remains only to notice the Railway and Canal Traffic Act (1854), 17 & 18 Vict. c. 31, and the statutory principles which it engrafts on the common law duties and rights of railway and canal carriers. The statute assimilates for many purposes the constitution of these two special classes of carriers, as distinguished from other land and water carriers; and its provisions, as stated and noticed in the two following chapters, will be received as being equally applicable to the subject of canal carriers, which will be considered in the concluding chapter of this treatise. It will also be understood that this statute applies to *railway* carriers and *canal* carriers, solely and exclusively, as distinguished from all other descriptions of carriers; and it will be necessary not to confound its principles with those which govern the duties and rights of other carriers.

(s) See generally Hodges on Railways, Shelford on Railways, and Wordsworth on Railways.

CHAPTER XIII.

ON THE RAILWAY AND CANAL TRAFFIC ACT, 1854, SECT. 7.



WHEN the first edition of this treatise was published, the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31) had hardly come into operation; and many of its provisions, which have received subsequently an elaborate interpretation in the superior courts of common law, were then chiefly matters only of professional speculation and uncertainty. The statute is given in the Appendix; and it is the purpose of this chapter to treat of it irrespectively of those earlier sections, which concern exclusively the law of injunctions against undue preference, and which will be the subject of the following chapter.

This statute, although anterior in date to some of the statutes which have been noticed in the preceding chapter, may be regarded fitly as supplementary and complementary to them. If the whole could be digested into one Consolidation Act, which should comprise also the Carriers' Act and the different canal companies acts, it would probably be a great gain to the law of the United Kingdom; and if its provisions could be extended, so far as they might be applicable, to all carriers, whether by land or by water, and especially to all railway companies, a large amount of the law of carriers, which must now be left shaded in the mysteries of private acts, and of not quite transparent common law cases, would be capable of an elucidation which is now virtually impracticable.

It must, therefore, be repeated, that only in the study of a railway company's private act can a complete under-

standing of any branch of carriers' law be obtained in questions which concern individual companies as carriers; and it can only be laid down generally that the principles, which have been stated already, and which are about to be stated, are those by which the rights, duties, and liabilities of railway carriers are to be measured only, independently and irrespectively of the controlling or extending clauses of such private acts, and of the duly authorized bye-laws of each company. For when a railway company is exempt by statute from a common law liability as a carrier, a customer must prove a special contract with him to create a liability in him (*a*).

The object of the 17 & 18 Vict. c. 31, was twofold. The first six sections, which will be treated subsequently, are directed to the suppression or regulation of a system of undue preference, or favoritism, by which railway companies, after acquiring a virtual monopoly of carriage through their line of district, introduced conditions of carriage which either operated generally in producing hardship to the public customer, or in giving unfair advantages to one class of public traders over other similar classes, or individuals of such classes. At common law, and independently of this statute, there seems to be no doubt that all carriers have the power of binding their customers by an express acceptance of, or constructive acquiescence in, any conditions of carriage, however harsh and unreasonable they may be; and that even where the customer refuses expressly to consign goods for carriage to a common carrier, subject to an unreasonable condition, the customer will yet be bound by such a condition, notwithstanding his dissent, if the customer, instead of suing the carrier for refusing to carry; according to his common law duty, send the goods by the carrier, after such a demand and requisition by him (*b*). To such an extent had this

(*a*) *Elwell v. Grand Junction Railway*, 5 M. & W. 669.

2 E. & B. 750; 23 L. J. 73, Q. B.;
cf. *Erlc, J., M'Manus v. Lancashire Railway*, 4 H. & N. 341; 23 L. J.

(*b*) *Walker v. Midland Railway*,

doctrine proceeded, when the 17 & 18 Vict. c. 31, was passed, that numerous cases had decided that, where a carrier had made a contract, by which he stipulated that he would not be answerable, even for the results of his own gross negligence, the contract was binding, and the carrier was not answerable for any loss or damage occasioned by his own negligence, however gross that might be (c).

“ In consequence of these decisions the legislature interposed with the act of the 17 & 18 Vict. c. 31. It was thought, and, in my opinion, wisely thought (carrying by railway being now the only means of conveyance which modern convenience admits of), that to enable a railway company, having this monopoly, to say, we will not be liable for the consequence of our own negligence; and to enable them to establish that immunity by their contracts in the broad unqualified manner in which railway companies, in those instances, had succeeded in doing, was not any longer to be permitted; and that it would be for the public benefit that the legislature should interfere. Accordingly this act was passed, which in substance provides by the 7th section, that it shall not be competent to a railway company to limit their liability in respect of injury or damage arising from their own negligence, unless it should be found that the circumstances under which they sought thus to restrict their liability, made the restriction just and moderate” (d).

The seventh section is the following :—

Sect. 7. “ Every such company as aforesaid shall be liable for the loss of, or for any injury done to, any horses, cattle, or other animals, or to any articles, goods, or things in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its

354, Exch.; *M'Andrew v. Electric Telegraph Company*, 17 C. B. 3; 25 L. J. 26, C. P.; *Crompton, J., Peek v. North Staffordshire Railway, El., B. & El.* 958; 27 L. J. 470, Q. B.

(c) Cf. cases cited by Blackburn, J., 29 L. J. 219, Q. B.

(d) Per Cockburn, C. J., *Harrison v. London, &c. Railway*, 29 L. J. 209, Q. B.

servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability, every such notice, condition, or declaration being hereby declared to be null and void : provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged, by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable. Provided always, that no greater damages shall be recovered for the loss of or for any injury done to any such animals beyond the sums hereinafter mentioned : that is to say, for any horse, 50*l.* ; for any neat cattle, per head, 15*l.* ; for any sheep or pigs, per head, 2*l.* ; unless the person sending or delivering the same to such company shall at the time of such delivery have declared them to be respectively of a higher value than as above mentioned, in which case it shall be lawful for such company to demand and receive, by way of compensation for the increased risk and care thereby occasioned, a reasonable per centage upon the excess of the value so declared above the respective sum so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge ; and such per centage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. 4 & 1 Will. 4, c. 68, and shall be binding upon such company in the manner therein mentioned : provided also, that the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury ; provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be *signed* by him or by the person delivering

such animals, articles, goods, or things respectively for carriage; provided also, that nothing herein contained shall alter or affect the rights, privileges or liabilities of any such company under the said act, 11 Geo. 4 & 1 Will. 4, c. 68, with respect to articles of the descriptions mentioned in the said act."

The strange phraseology (*e*) of this exceedingly ill-drawn (*f*) and very obscurely worded section (*g*), heaping proviso on proviso (*h*), has been conjectured to indicate an intention of the legislature to place the whole railway system under the control of the courts; and it has been stated, that the result of its provisions is: "general notices to limit liability shall be null and void; but the company may make special contracts with their customers, provided they are just and reasonable and signed; and whereas the monopoly created by railways compel the public to employ them in the conveyance of their goods, the legislature have thought fit to impose the further security, that the court shall see that the condition, or special contract, is just and reasonable" (*i*). This general principle, as stated in one of the latest decisions, contains a summary of them under the statute; but as they abound in distinctions and uncertainties, in the special applications of the rule, the cases will now be stated shortly.

In *Wise v. Great Western Railway Company* (*k*), compensation was sought for injury by cold to a horse which had been sent from London to Windsor by the railway of the defendants. The consignee had no notice from the sender till the following day, when he went to the station and found that the horse had been left in a horse box, which had been shunted to a siding, and there forgotten by the porters. The defendants relied on a special contract

(*e*) Cockburn, C. J., 29 L. J. 215, Q. B.

(*f*) Lord Campbell, C. J., 27 L. J. 471, Q. B.

(*g*) Jervis, C. J., 26 L. J. 32, C. P.

(*h*) Lord Campbell, C. J., *supra*.

(*i*) Jervis, C. J., 26 L. J. 32, C. P.; *cf. per cur.*, *M'Manus v. Lancashire, &c. Railway*, 4 H. & N. 318; 28 L. J. 359, Exch., Sc. Cam.

(*k*) 1 H. & N. 63; 25 L. J. 258, Exch.

with the sender, and signed by him, by which the defendants stipulated that "they will not be answerable for damage done to any horses conveyed by this railway." The court held, that, under the contract, the defendants were not liable for any damage which might be done to the horse; but they rested their judgment partly on the fact, that, although the defendants "had been blameable to a certain extent, the real person who produced the mischief was the sender of the horse, who sent him without any intimation that he was coming." In this case it was not seriously considered, whether the defendants had been guilty of gross negligence; nor whether the special contract would have freed them from responsibility for it: but the language of the contract seems to have been thought comprehensive and vague enough to protect the defendants from such unascertained negligence as the case alone disclosed. But no question was raised as to the validity of a condition which proposes to exempt from liability for gross negligence; and although this case may appear to be an authority in favor of the affirmative of such a proposition, it must be considered as clearly overruled in this respect by *M'Manus v. Lancashire Railway* (1).

In *Simons v. Great Western Railway* (m), in an action for loss and damage to goods by the plaintiff's negligence, the defendants relied, first, on a condition in a special contract by which the defendants stipulated that they would not be "accountable for the loss, detention or damage of any package improperly or insufficiently packed;" and, second, on a condition, in the same contract, that they would not be responsible "for any risk of stowage, loss or damage, however caused, to goods conveyed at special or mileage rates." The first condition was held to be unreasonable, and the contract therefore void (n); but the second was held to be a reasonable condition. In this

(1) *Infra*.(n) *Cf. Munster v. South-Eastern*

(m) 18 C. B. 805; 26 L. J. 25, C. P.; Railway, 4 C. B., N. S. 676; 27 L. J. s. v. Erle, J., 27 L. J. 472, Q. B. 308, C. P.

case, as in the preceding one, it seems to have been assumed, rather than argued, that the condition was not bad as purporting to exempt from liability for every description of negligence; and so far it is also overruled by *M'Manus's* case. It was also held, in this case, that conditions may be good in part and bad in part; and that they are not void as a whole because a portion of them cannot be sustained (*o*).

At the same time the court decided in a county court case, which was sent back to the judge to be re-stated, that only the judges of the superior courts, and not the judges of county courts, can decide on the reasonableness of a condition under the statute (*p*).

In *White v. Great Western Railway* (*q*), the condition was, that "the company will not, under any circumstances, be liable for loss of market, or other claim arising from delay or detention of any train, whether at starting, or at any of the stations, or in the course of the journey." This condition was held reasonable, and to protect the defendants from liability for undue delay in forwarding the plaintiff's goods in time for a specified market.

So where the condition was, that "the company is to be held free from all risk or responsibility in respect of any loss or damage arising in the loading or unloading of cattle, from suffocation, or from being trampled or bruised, or otherwise injured in transit, from fire, or from any cause whatsoever;" it was held to protect the defendants from responsibility for the loss of cattle by suffocation during the journey, although caused by the negligence of the servants of the defendants. *Martin, B.*, said: "The common law liability of common carriers does not apply to cattle at all. In former days they were not carried. They might, therefore, but for the statute, make what conditions

(*o*) Cf. *Harrison v. London, &c. Railway*, 29 L. J. 217, Q. B., *Wightman, J.*

Railway v. Dunham, 18 C. B. 326; 26 L. J. 25, C. P.

(*q*) 2 C. B., N. S. 7; 26 L. J. 158,

(*p*) *London and North-Western C. P.*

they pleased." Bramwell, B., said: "It would be quite monstrous to say that such a bargain might not be made between man and man. It seems quite reasonable that the company should say, 'We will not be liable for any injury done to the cattle by our servants;' they receive a smaller sum for the carriage of the cattle in consequence of their being exempt by the contract from liability; and it would be very strange if we were to hold that, after such a contract was made, the owner of the cattle might recover. I think the question of reasonableness under the statute does not arise; but, if it does, I think that such a notice would be reasonable" (r). Although these two last cases have not been expressly overruled, it may be submitted that they have been virtually overruled by *M'Manus v. Lancashire, &c., Railway*, and *Beal v. South Devon Railway*, which will be noticed later, so far as they purport to exempt from liability for gross or wilful negligence.

In *Peek v. North Staffordshire Railway (s)*, the following condition was held to be reasonable:—"The North Staffordshire Railway Company hereby give notice, that they will receive, forward, and deliver goods solely subject to the conditions hereunder stated. 5th. That the company shall not be responsible for the loss of, or injury to, any marbles, musical instruments, furniture, toys or any other articles, which, from their brittleness, fragility, delicacy or liability to ignition, are more than ordinarily hazardous, unless declared and insured according to their value." This condition was held to protect the company from responsibility for damage by wet, without wilful negligence, to some marble chimney-pieces which had been sent expressly under a duly signed special contract *not insured*, and which would not have been damaged if they had been of ordinary stone, such as granite. The judgment of the court was partly reversed in error (t), on the collateral question, which

(r) *Pardington v. South-Western Railway*, 1 H. & N. 392; 26 L. J. 105, Exch.

(s) El., B. & El. 958; 27 L. J. 465, Q. B.

(t) El., B. & El. 986; 29 L. J. 97, Q. B.

will be noticed later, whether the contract had been signed sufficiently within the statute. But the above result remains the same.

In *M'Manus v. Lancashire and Staffordshire Railway* (*u*), the question arose, of which the affirmative seems to have been assumed in *Simons v. Great Western Railway* and *Pardington v. Great Western Railway*; viz., whether a special contract is good which embodies a condition by which a railway company is exempted from responsibility for wilful or gross negligence. The action was for damage to some horses during their transit from Liverpool to York, in a truck which appeared to be sufficient for the purpose, but which proved not to be so, as a hole was made in it during the journey, and the horses were thereby injured. There was no evidence of express negligence in the defendants (*x*); and the question turned on the reasonableness of the following special contract, on which the defendants relied, and which had been signed by the plaintiff. "This ticket is issued subject to the owner's undertaking all risks of conveyance, loading and unloading whatsoever, as the company will not be responsible for any injury or damage (howsoever caused) occurring to live stock, of any description, travelling upon the Lancashire and Yorkshire Railway, or in their vehicles. H. M'Manus, owner, or on the owner's behalf, agrees to the above terms." The Court of Exchequer held this condition to be reasonable, and the contract therefore good; and also on the ground that the carriers are not liable for damage to live animals without negligence. This judgment was reversed in the Exchequer Chamber (dissentiente Erle, J.) on the ground that the condition was unreasonable, as it professed to exempt the defendants from responsibility for wilful negligence. The majority of the court said: "It would, we think, not only be unreasonable, but mischievous, if the defendants

(*u*) 2 H. & N. 693; 27 L. J. 201,
Exch.; 4 H. & N. 327; 28 L. J.
352, Exch., Sc. Cam.

(*x*) Cf. *Coxon v. Great Western
Railway*, 5 H. & N. 274; 29 L. J.
165, Exch.

were to be allowed to absolve themselves from the consequences of neglecting to perform properly that which seems naturally to belong to them as a duty. It is unreasonable that the company should stipulate for exemption from liability for the consequences of their own negligence, however gross, or misconduct, however flagrant; and that is what the condition professes to do. That condition is therefore void; and the case stands simply on the ground, that the plaintiff has employed the defendants to carry his horses safely, and that they have used an insufficient and improper vehicle for that purpose, whereby the horses have been injured."

It may be remarked, that the judgment of the Exchequer Chamber in this case, which was for the plaintiff generally, seems to have proceeded entirely on the ground that the condition was unreasonable; and the court seems to have ignored the fact, which was noticed particularly in the court below, that no negligence in fact was shown: and as the defendants do not appear to have been sued as common carriers, it must be inferred that the superior court either considered that the circumstances justified the inference that the defendants were common carriers, and therefore liable as insurers; or that negligence in law was presumed from the fact of the accident, according to the doctrine, which has been already noticed (*y*), that damage by accident is *primâ facie* evidence of negligence. It also indicates that, contrary to the view of Erle, J., in the Exchequer Chamber, and of the court below, goods and live stock are on the same footing under the 17 & 18 Vict. c. 31, s. 7; and that it is equally unreasonable and illegal in both cases for a carrier to stipulate that he will carry only subject to a condition that he shall not be liable for damage by his negligence.

The later case of *Harrison v. London and Brighton Railway* (*z*), supports this view. There the defendants were sued as common carriers for the loss of a retriever

(*y*) *Supra*, p. 126

(*z*) 29 L. J. 209, Q. B.

dog valued at 21*l*. Instead of being put in the usual dog box, it had been put in a horse box of the train, where the plaintiff's horse had been placed, at the suggestion of a servant of the defendants, and with the consent of the plaintiff's servant in whose charge it was; and it was lost during the journey, without express negligence in fact, by the dog casually escaping through a window of the box. When the defendants received the dog the plaintiff signed the following ticket:—

“London, Brighton and South Coast Railway.
Horse, Carriage and Dog Ticket.

No. 2, 249.

12 o'clock Train.

Date, Oct. 29, 1858.

From to Worthing.

Amount paid.

	£	s.	d.
2 . . horses	1	12	0
4-wheel carriage			
1 . . 2-wheel carriage	1	1	0
1 . . dog	0	3	0
	<hr/>		
	2	16	0

Name, Harrison.

Received the annexed ticket subject to the following conditions:—

The company will not be liable in any case for loss or damage to any horse or other animal above the value of 40*l*., or any dog above the value of 5*l*., unless a declaration of its value, signed by the owner or his agent, at the time of booking, shall have been given to them; and by such declaration the owner shall be bound, the company not being in any event liable to any greater amount than the value so declared. The company will in no case be liable for injury to any horse or other animal, or dog, of whatever value, when such injury arises wholly or partially from fear or restiveness. If the declared value of any horse or other animal exceed 40*l*., or any dog 5*l*., the price of conveyance will, in addition to the regular fare, be after the rate of 2½ per cent., or 6*d*. per pound, upon the declared value above 40*l*., whatever may be the amount of such value, and for whatever distance the horse or other animal is to be carried.

Daniel A. Harrison,
the owner, or on the owner's behalf.

A. G. S., booking-clerk.”

It was held by the majority of the court, first, that the meaning of this ticket, the whole of which must be read together, was, that if the value of a dog was above 5*l*., and its value was not declared, and the extra price paid

accordingly, the defendants would not be liable at all, even for loss or injury caused by their own negligence, and that the condition was, therefore, void within the 17 & 18 Vict. c. 31, s. 7; secondly, that this condition was not "just and reasonable," because the extra charge of $2\frac{1}{2}$ per cent. (without proof to the contrary, which it lay on the defendants to give), appeared excessive and unreasonable; and, thirdly, that the condition being void, the plaintiff, although there was no negligence on the part of the defendants, was entitled to recover the full value of the dog against them as common carriers.

The judgment in this case was in strict agreement with that of the majority of the Court of Exchequer Chamber in *M'Manus v. Lancashire, &c. Railway*; but as Erle, J., dissented there, so Wightman, J., dissented in *Harrison v. London, &c., Railway*, on the ground that the different clauses of the ticket were separable, and that the first meant that the defendants would not be liable beyond 5*l.* for injury however caused; and that this was a reasonable condition, which precluded the plaintiff from recovering more than 5*l.* But the doctrine of *M'Manus v. Lancashire Railway* still embodies the law as it is on the subject, although many judges have expressed dissatisfaction with that case in the Exchequer Chamber. But it was again recognized in *Beal v. South Devon Railway* (a). There fish had been sent from Torquay to London by a morning train; and the action was for not delivering it in time for the Billingsgate market, as, according to the ordinary course of the business of the defendants, it ought to have been delivered. The delay did not appear to have arisen from negligence. The defendants were not sued as common carriers, and they relied on a signed special contract, by which it was stipulated that they would not "be responsible, under any circumstances, for loss of market, or other loss or injury arising from delay or detention of trains, exposure to weather, stowage, or from any cause

(a) 5 H. & N. 875; 29 L. J. 441, Exch.

whatsoever, *other than gross neglect or fraud.*" The defendants had also given a public notice that they carried fish by special agreement only and on the above terms. The majority of the court, Pollock, C. B., Bramwell, B., and Channell, B., held that the italicized words took the case out of that of *M'Manus*, and that it was a reasonable condition for the conveyance of fish. But Martin, B., held that the case came within that of *M'Manus*. Bramwell, B., while declaring himself bound by that case, intimated a strong disapprobation of it.

In an earlier case, which does not seem to have been noticed in *Beal v. South Devon Railway*, fish had been consigned to be carried from Yarmouth to London: and the plaintiff had signed a notice by which the defendants undertook only to deliver within a reasonable time. At an intermediate station the truck containing the fish was shunted aside, from some unexplained cause, and forgotten. Consequently it was not taken to London by the usual train, but by a later one; and the plaintiff lost the market which he would otherwise have had. As the plaintiff had sent fish before by the same train, and in the usual course of traffic it had arrived in time for the market, the defendants were held liable for the delay and non-delivery in due time. This case is clearly distinguishable from the preceding one, as the special contract did not purport to protect the defendants from the consequences of their negligence (*b*).

In *Lewis v. Great Western Railway* (*c*) the condition was, that "the company will not be answerable for the loss of goods untruly or incorrectly described. No claim for loss will be allowed unless made within seven days after the time when the goods should have been delivered." This was held to be reasonable, and to protect the defendants against a claim for books and clothes contained in packages which had been delivered to the defendants as

(*b*) *Wren v. Eastern Counties Railway*, 3 L. T. Rep., N. S. 5.

(*c*) 5 H. & N. 867; 29 L. J. 425, Exch.

“furniture;” and when the claim was made more than seven days after the arrival of the packages at the station, but within seven days of their actual delivery to the plaintiff at his residence.

A regulation, under a railway company’s private act, that passengers shall not be allowed to place wearing apparel, shawls, and the like, in the luggage van of a train, without some wrapper to cover them, has been held unreasonable and void (*d*).

No certain criterion of the reasonableness of a condition has been yet given; and it has been said that “reasonableness is a relative term. A thing may be reasonable with reference to certain circumstances, when with reference to certain other circumstances it may be unreasonable” (*e*). It has been said also, that even “a condition which excludes all liability may be reasonable, provided a reasonable *bonâ fide* alternative is offered to the customer” (*f*); and, at the same time, Cockburn, C. J., cited *M’Andrew v. Electric Telegraph Company* (*g*), to show that all liability for inaccuracy in the transmission of a message may be well excluded, if a customer may secure accuracy by paying a higher rate for a repeated message. Thus, in *Harrison v. London, &c. Railway*, the condition was thought unreasonable, not because the company charged more for the carriage of dogs above 5*l.* in value than for dogs below that value, but because the rate of insurance and extra charge were out of due proportion to the increased value; and hence, there was no *bonâ fide* alternative afforded to the plaintiff.

It will be apparent from the preceding cases, and from the language of 17 & 18 Vict. c. 31, s. 7, that all general conditions, as well as all special conditions, by which a

(*d*) *Munster v. South-Eastern Railway*, 4 C. B., N. S. 676; 27 L. J. 308, C. P.; cf. *Erle, J.*, 27 L. J., 473, Q. B.

(*e*) Per Bramwell, B., 5 H. & N. 885; 29 L. J. 446, Exch.

(*f*) Per Blackburn, J., 29 L. J. 212, Q. B.

(*g*) 17 C. B. 3; 25 L. J. 26, C. P.

railway or canal company seeks to free itself from responsibility for wilful or gross negligence, are absolutely void ; and it will probably be thought that any such general or special condition, by which such a company proposes to become irresponsible for any kind of actual negligence, falls within the same prohibition. To bring a company within this rule, it is enough that they are carriers ; and it is not necessary that they should be common carriers. Nor does the act diminish in any way the rights, privileges, and liabilities which they have under the 11 Geo. 4 & 1 Will. 4, c. 68 (the Carriers' Act) ; while it expressly retains such rights and liabilities, with respect to articles of the descriptions mentioned in that act.

A special contract under the 7th section is signed sufficiently if it be signed by the consignor of goods, and acted upon by the railway company. This was decided in *Peek v. North Staffordshire Railway* (*h*). There the plaintiffs' agent signed an order, "Please to forward the marbles not insured." The Court of Exchequer held that this was insufficient evidence of a contract under the statute, and that parol evidence could not be imported to complete it. But this judgment was reversed in the Exchequer Chamber, and the rule was laid down as stated above.

(*h*) El., B. & El. 958 ; 27 L. J. 465, Q. B. ; Sc. Cam., El., B. & El. 986 ; 29 L. J. 97, Q. B.

CHAPTER XIV.

ON INJUNCTIONS UNDER THE RAILWAY AND CANAL TRAFFIC
ACT, 1854—ON THE SCALE OF CHARGES.



A PRINCIPAL object of the 17 & 18 Vict. c. 31, was to counteract and limit the tendency of railway carriers to establish systems of favouritism and preference, by which they advanced their own pecuniary interests, and those of some of their customers, to the detriment of less favoured customers, and of the public generally. It was discovered, very soon after the establishment of railways, that one practical result of their institution was, not only to damage seriously, and almost to destroy, the trade of private carriers, but to give railway carriers almost unlimited opportunities of dictating their own terms, and of imposing their own scale of charges on the public. The legislature, while admitting the necessity and policy of open competition, thought it only just to private carriers, in the first instance, that the sacrifices, to which they were bound to submit on public grounds, when road carriage was superseded by railway carriage, should not be augmented, unduly and unnecessarily, by permitting railway companies to complete the ruin of one class, or of members of a class, of carriers, by making unreasonably preferential bargains with other classes of such carriers, or with individuals of such classes. It was still more anxious to prevent the interests of the public from suffering by the inexpedient absorption of other modes of traffic and carriage in the powerful monopolies of railway companies.

A great abuse had grown up in the practice of railway

carriers to carry for certain customers at rates reduced, disproportionately and causelessly, below those which the companies offered to the public generally (*a*). Such a practice, as has been stated already (*b*), was probably illegal, although the 17 & 18 Vict. c. 31, s. 2, appears to have been passed for the express purpose of rendering it so in the case of railway and canal carriers. Independently of that statute, it is still lawful for a public company, entitled to take tolls from the public, to remit such tolls at their pleasure and discretion, or any portions of them, in favour of particular persons (*c*). In the uncertain and difficult applicability of the common law to collusive combinations between railway carriers and particular customers, many of the private acts of railway companies were furnished with enacting, or declaratory, clauses, by which they were bound to charge fairly, equally, and reasonably, to all persons alike under like circumstances (*d*). This principle is extended by the 17 & 18 Vict. c. 31, s. 2, and the four following sections, to all railway and canal companies.

The second section enacts substantially that such companies shall give all reasonable facilities for receiving, forwarding, and delivering traffic; and that they "shall not give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Continuous and conterminous railway or canal companies must observe the same rule; and must provide all reasonable facilities for forwarding traffic by their respective routes, and must afford the public all reasonable accommodation.

(*a*) See *Parker v. Great Western Railway*, 7 M. & G. 253; and *infra*.

(*b*) *Supra*, p. 202.

(*c*) *Hungerford Company v. City*

Steamboat Company, 30 L. J. 25, Q. B.

(*d*) *Infra*.

To carry out the purposes of this section, the Court of Common Pleas in England, the Court of Session in Scotland, and any of the superior courts in Dublin, have power to entertain any complaint from any company, or individual, that any provisions of the act have been infringed. These courts may either refer the ground of complaint to an engineer or other arbitrator; and, if satisfied that it is well founded, may issue an injunction, or interdict, to the company against further continuing the violation of the act. In case of disobedience, an attachment will issue against any of the directors of the company, or other person failing to obey the injunction. In this case the court or judge may order the company to pay money into court, not exceeding 200*l.* (sect. 3). The court has also power to make rules for carrying the act into effect (sect. 4); under which power they acted by issuing rules in Hilary Term, 1855 (*e*); and, if they think fit, may direct a rehearing of an application, and may vary a previous order (sect. 5). These enactments do not at all take away nor diminish the common law rights of any person against the company (sect. 6): and hence it follows that recourse to the statute, for a remedy against unreasonable charges by a railway carrier, is a cumulative privilege, which does not interfere with the customary common law right to recover back excessive charges, or to sue such carrier as a common carrier for refusing to carry (*f*).

Thus it will be seen that the statute imposes a new and difficult duty on the specified courts, to determine whether a particular mode of traffic, or a particular scale of charge by railway or canal company carriers, is or is not an undue and unreasonable advantage derived from their position as carriers, who are invested practically with a statutory monopoly. No rule for the guidance of the court is given by the statute. Nothing can be larger, nor less explicit than its language. It may be that the nature of the enactment precluded a more distinct explanation of

(*e*) See Appendix.

(*f*) *Supra*, p. 200.

its intention and scope; but it is clear that it gives the judges of the superior courts unlimited powers in the extension or restriction of the definition of "unreasonable or undue preference;" while it affords them no canon of construction, except that which may suggest itself intuitively from the particular circumstances of each case. The second section of the act has not received quite the same amount of judicial condemnation which has been lavished freely on the seventh section (*g*); but, from the first, the judges have complained that they have been required by the legislature to determine "questions of a very difficult and complicated character, and such as they feel but little qualified to decide" (*h*).

In a subject, therefore, which, from its nature, is one of particular and isolated details; of special computation, rather than of comprehensive principle; it will not be matter of surprise that few general rules have been settled, and that still fewer have been stated distinctly and unrestrictedly. The courts have acted on the privilege, which the statute undoubtedly gives them, of doing rough justice between the companies and the public; taking care to bend the interests of the former to those of the latter, rather than those of the latter to the former; and of regarding the tendency of a pernicious practice, and the complexion of a doubtful one, as well as manifest objections to one which has resulted already in public or private loss. When the grievance has been reducible to one of arithmetic and calculation, the court has not failed to treat it as one of figures, in which they have always considered the fair interests of the companies, as well as those of the public, and of private individuals. But when the grievance passes beyond the province of arithmetic, and has been remotely, or even suspiciously, wrong in principle, rather than obviously unfair in practice; the court still does not hesitate to follow the precedents of a court of equity, and to

(*g*) *Supra*, p. 262.

Counties Railway, 1 C. B., N. S.

(*h*) *Per Cresswell, J.*, in giving judgment in *Ransome v. Eastern*

452; 26 L. J. 93, C. P.

mould its decrees to suit the rights and expediency of particular cases (*i*).

One of the first cases decided that an action will not lie, and therefore it is to be inferred that an injunction will not be granted, against a railway company for refusing to admit a carrier of passengers and goods within the precincts of their station, to which they admitted the public generally; but if there had been sufficient evidence of a dedication to the public, which there was not in this case, it would have been different (*j*). But if the company admit one carrier within their station, while they exclude another, under substantially similar circumstances; an injunction will be granted to compel the company to admit a complainant at all reasonable times, in the same way as they admit other vehicles of the same kind. This was the form of the injunction, when it appeared that the company admitted W., a carrier of passengers and goods from Kingston to the Kingston station, within the station; but excluded M., a carrier, similarly from the Kingston station to Twickenham, Teddington, and other places; in consequence of which exclusion the passengers by M. had to walk, and carry their luggage and goods seventy-five feet into the station. But it is not to be inferred from this case that a railway company have not the right to limit reasonably the admittance of public vehicles, within the area of their stations, for the purpose of taking up and setting down passengers or goods (*k*). It must be noticed, however, that the injunction was granted in this case, not because W. had an undue preference over M., which does not seem to have been affirmed; but because a public inconvenience was caused to M.'s customers, which W.'s, under similar circumstances, had not to suffer. Therefore, where a company granted to C., for a fixed annual sum, the exclusive right of having his

(*i*) Cf. *Cooper v. London and South-Western Railway*, 4 C. B., N. S. 768; 27 L. J. 324, C. P. Company, 18 C. B. 46; 25 L. J. 184, C. P.

(*j*) *Barker v. Midland Railway* (*k*) *Marriott v. London and South-Western Railway*, 1 C. B., N. S. 499; 26 L. J. 154, C. P.

cabs stand for hire within the station; an injunction was refused, to make the company allow another cab proprietor a similar right to have his cabs stand within the station, because it did not appear that any public inconvenience was caused by the company's arrangement with C.; and also, it may be presumed, from later cases, because it did not appear that the due interests of the company had been unfairly considered; nor that they had refused, for equal consideration, to grant a corresponding privilege to the applicant (*l*). To the same effect is *Ex parte Painter*, where Cresswell, J., said: "Before we put the powers of the act in motion, we must be satisfied that there is some substantial injury or inconvenience to the public, and that the complaint is made *bonâ fide* on behalf of the public (*m*).

In *Marriott v. London and South-Western Railway*, it was suggested by Cockburn, C. J., that a railway company is bound to find reasonable accommodation for the public; and that if people had had to walk the seventy-five feet in wet weather, without a covered way, the accommodation would not have been reasonable. This doctrine conflicts with a dictum of the court in *Blackmore v. Bristol and Exeter Railway* (*n*), but seems to be confirmed by *Caterham Railway v. London and Brighton Company, &c.* (*o*), where an injunction was granted to compel the defendants to make a covered station at the junction of their railway with that of the complainants, as being a reasonable accommodation to which the public were entitled.

In these cases, and also in the following one, importance was attached to the principle, that an injunction will be granted only where the grievance is one of a kind which is likely to be injurious to the public interests; and not merely prejudicial to private interests. This distinction has been assumed, but perhaps not followed quite so expressly in later cases. In some, perhaps, it may appear to

(*l*) *Beadell v. Eastern Counties Railway*, 2 C. B., N. S. 509; 26 L. J. 250, C. P.

(*m*) 2 C. B., N. S. 705.

(*n*) 8 Ell. & B. 1050; 27 L. J. 171, Q. B.

(*o*) 1 C. B., N. S. 410; 26 L. J. 161, C. P.

have been lost sight of; or at most to have been indistinctly before the mind of the court. But, in *Barrett v. Great Northern and Midland Railway* (*p*), the application was founded on a personal inconvenience, which the complainant alleged that he had sustained, by the refusal of the Great Northern Railway to book him through from King's Cross to a station on the Midland Railway, which was continuous to and adjoining the Great Northern Railway; and for a similar refusal by the Midland Railway to book him through to King's Cross, on the return journey. The rule nisi was discharged with costs, because it did not appear that any public inconvenience had been sustained: and it was stated by Cockburn, C. J., "that it is not indispensably necessary to show a case of individual grievance; but it is clear that a case of public inconvenience must be made out."

In *Ransome v. Eastern Counties Railway* (*q*), the complaint was, that the defendants carried coals for P. from Peterborough, at a lower sum per ton per mile than they charged the complainant for carrying his coals from Ipswich to various places on the line. It appeared that this arrangement with P., who brought his coals by inland road, was to enable him to compete with the complainant, who brought his coals by sea to Ipswich. The court granted an injunction, that the defendant should carry the complainant's coals on equal terms with P., having due regard to the circumstances, if any, which rendered the costs of conveying for P. less than the costs for conveying for the complainant. It appeared that P. used his own trucks, and that the complainant used the company's trucks; and it was held, that this element of extra charge was fairly computed by the company in charging P. less than the complainant. The court also threw out the suggestion, which has since been established, that the fair interests of the company are to be consulted in such cases; and that companies may reasonably charge a less proportionable

(*p*) 1 C. B., N. S. 423; 26 L. J. 83, C. P.

(*q*) 1 C. B., N. S. 437; 26 L. J. 91, C. P.

tariff for larger guaranteed quantities of traffic, and may diminish the tariff in proportion to the increased length of the transit.

This case and doctrine were expressly confirmed and acted on in *Oxlade v. North-Eastern Railway* (r), where the facts were very special, but resolved themselves into a complaint:—1st. That the company carried coals for third persons at a lower rate than they charged the complainant. On this point the Master's report found, that the circumstances justified the lower rate, and that similar facilities were open to the complainant. Acting on the rule in the preceding case, the court held, that the fair interests of the company were properly considered, and that no injunction ought to issue.

The 2nd ground complained of private agreements, which the company had made with third persons, to convey northern coke into Staffordshire at a reduced rate. The court held, that a desire on the part of the company to introduce northern coke into Staffordshire was not a legitimate ground for making such agreements; and that, as the pecuniary interests of the company were not affected thereby, on this ground an injunction ought to issue in the terms of the preceding case. But

3rd. The court refused to compel the company to provide trucks for carrying the plaintiff's coals, after he had refused to pay demurrage, at the same rate as other customers paid under like circumstances.

In *Jones v. Eastern Counties Railway* (s), the application was to compel the defendants to issue season tickets between Colchester and London, a distance of fifty miles, on the same terms as they issued them between Harwich and London, a distance of seventy miles: the charge from Harwich through Colchester to London being 20*l.* per annum, and from Colchester to London 45*l.* It was suggested that this arrangement gave an unfair preference to

(r) 1 C. B., N. S. 455; 26 L. J. 129, C. P.

(s) 3 C. B., N. S. 718.

the inhabitants of Harwich over those of Colchester; but the court, without assigning reasons, refused a rule, on the ground, apparently, that there was no real competition of interests between the two towns (*t*).

In *Caterham Railway v. London and Brighton, &c. Railway (u)*, an injunction was sought on the grounds—

1st. That the defendants, who were two distinct companies, ran trains at a less proportionable charge, on their own main line and branches, than they ran them on their conterminous lines to the terminus of the line of the complainants, whose railway formed a short branch from the line of one of the defending companies.

2nd. That the trains did not stop often enough at the junction station.

3rd. That the defendants did not issue return third class tickets to Caterham, as they did on their own lines and branches.

4th. That there was no covered station at the junction.

The court granted an injunction on the fourth ground only, as disclosing a case of public inconvenience, as well as of undue preference against the complainants. On the three other grounds they held, that no public inconvenience, and no preference to any similar species of traffic, were shown to exist; and that no injunction also should issue, as it did not appear that the charges on the main lines, and branches of the defending companies, were higher proportionably than those to the Caterham stations; and that as to the third class tickets it did not appear that they were issued to any station below one of the earlier stations, —Croydon,—on the line of the defending companies.

In *Harris v. Cockermouth and Workington Railway (x)*, the colliery of the complainants, and F.'s colliery adjoined the railway; and in point of quantity of traffic, and length of transit, there was no substantial difference. The de-

(*t*) Cf. *Hozier v. Caledonian Railway*, 3 C. B., N. S. 720, n. 161, C. P.
 (*x*) 3 C. B., N. S. 693; 27 L. J.
 (*u*) 1 C. B., N. S. 410; 26 L. J. 162, C. P.

fendants proposed to justify a lower tariff in favour of F., who was a tenant of Lord L., on the ground that thereby Lord L. had been induced to desist from conveying his coals by the ordinary road, and to carry them by the railway; and also because Lord L. had threatened to construct another railway for carrying coals if the defendants did not agree to carry for F. at the reduced tariff. The court held that the injunction ought to issue, as the agreement was of a private nature, and void, therefore, as not founded on a rule applicable to all persons similarly circumstanced. Cockburn, C. J., said:—"Whatever rule the company may lay down, it ought to be a rule applicable to all persons similarly circumstanced. I do not think this is such a rule. It is plain that, if we were to take into consideration the circumstances upon which Mr. Manisty relied, there is no case in which we should not be called on to enter into a consideration of the various circumstances which may influence one person, as distinguished from another, in sending his goods by a particular railway. Circumstances differ in every individual case; and it might always be a question how far the company would be justified in making particular bargains. I do not think it was the intention of the legislature, or its policy, when railways were constituted, that they should have the power of making bargains with particular individuals, so as to give them advantages, and subject others to corresponding disadvantages. The intention of the legislature was, I think, to give equal advantages, as far as the rate of charge is concerned, to all individuals similarly circumstanced; and that a railway company, although they should have a right to lay down certain rules in reference to particular circumstances, provided they act *bonâ fide* with regard to their own interests and the interests of the public, should not be at liberty to make particular bargains with particular individuals, whereby one person is benefited and another injured. On that principle, as I think, the grounds put forward by the company are not sufficient to justify the

preference they have given to Messrs. Fletcher over the complainants, this rule ought to be made absolute.”

In *Ransome v. Eastern Counties Railway* (*y*), which was a renewal of the application in the earlier case of that name (*z*), the defendants had effected a distribution of districts, by which they had established practically a tariff, which enabled the Peterborough coal-dealers to have their coals carried at a reduced rate. But it was held, that, as this arrangement was open to the public generally, it was not void merely because it operated to the disadvantage of the complainants; and that it was their misfortune if the state of their trade did not happen to accommodate itself to a scale and system of districts, which did not appear to be disadvantageous to the public, nor objectionable in other respects.

But in the same case it appeared that the defendants had also established a tariff for the Peterborough dealers, which, by fixing a lower scale for carriage from Peterborough to the neighbourhood of Ipswich, had the effect of annihilating a portion of the distance between the two places in favour of the Peterborough traffic, and so of lessening the advantages which the Ipswich traders had by reason of their vicinity to the above places; and these facts were held to be ground for an injunction.

Subsequently a motion for an attachment against the company was made on the ground that the above anomalous charges had not been properly rectified; but on investigation it appeared, that, although an inequality remained, it was perhaps in favour of the applicants; and, as it also appeared, that the company had endeavoured honestly to obey the order of the court in the previous case, the motion was refused (*a*).

In *Cooper v. London and South-Western Railway* (*b*), the complaint as proved, was, that the defendants, after

(*y*) 4 C. B., N. S. 135; 27 L. J. Railway, 4 C. B., N. S. 159.
166, C. P.

(*b*) 4 C. B., N. S. 738; 27 L. J.

(*z*) *Supra*, p. 279.

324, C. P.

(*a*) *Ransome v. Eastern Counties*

having acted on the custom of unloading goods, and placing them in, or adjacent to, the waggons of the consignees, had discontinued this practice as to the complainant, while they retained it in other cases; and particularly in the case of Messrs. Pickford. The answer was, that the practice had been merely one of gratuitous indulgence; that as Messrs. Pickford's consignments were much smaller than those of the complainant, there was no real parallel in the cases; and that that, which was a trifling favour in the one instance, would be a serious burden in the other instance. The court took this view, and discharged the rule without costs; but they intimated, at the same time, that the company were not justified in their proceeding; and that if the case had shown that the complainant had requested the company to modify their objectionable custom, the court would have moulded the rule to restrict the undue prejudice to which the complainant had been subjected.

In *Baxendale v. Great Western Railway (c)*, the defendants had entered into an agreement with W. S., by which they agreed to carry his goods at a rate below the published and ordinary tariff, in consideration of his agreeing to send all his goods by the main line of the defendants; and also to employ other branch lines of the defendants, which were distinct from, and unconnected with, the main line. It was held, that the latter part of the consideration was invalid, as being founded on a traffic which was totally distinct from that of the main line; and that as there was no substantial difference between the quantity of traffic of W. S. and that of the complainants by the main line, an injunction ought to be granted. Cockburn, C. J., said: "The question is reduced to this;—whether it is a legitimate ground for giving a preference to one of the customers of the railway, that he engages to employ other lines of the company for traffic distinct from and unconnected with the goods in question, or their carriage, and we are of opinion that it is not. The goods are the same

in quantity and quality, in the cost of receiving and carriage, and in the profit which is thereby made, whether they be received from S. or from the complainants; and it is undue and unreasonable to charge more or less for the same service according as the customer of the railway thinks proper or not to bind himself to employ them in totally distinct transactions. In this respect the present case is altogether distinguishable from that of *Nicholson* against the same respondents, in which a difference of charge was sustained upon goods, from and to the same places, between persons who sent large quantities of goods at a time, and stipulated to send given large quantities every year, and others who declined to do so. The advantages there stipulated for by the company related to the carriage of the goods upon the same line, and directly affected the rate at which they could profitably be carried. In fact, these advantages made a difference similar to that between that of selling wholesale and retail;—the profit of carrying the goods sent in large quantities, at the less rate at which they were carried, equalling or exceeding the profit upon the goods sent in smaller quantities, at the greater rate at which they were carried. In the present case, as already explained, the advantages stipulated for are wholly distinct from, and do not affect the price or profit of this carriage from Bristol to London; and they ought not to be taken into account in determining the charge of such carriage.”

In *Baxendale v. Great Western Railway* (*d*), the respondents had carried goods on their railway at 3*s.* 6*d.* per ton from Reading to London; and had charged 4*s.* 10*d.* per ton for collecting and delivering them. The complainants carried on the same terms, using the railway of the respondents between Reading and London, and their own conveyance, for carrying to the station at Reading, and from the terminus in London. The company had subsequently made these two charges into an aggregate one of 8*s.* 4*d.* for carrying from Reading to London, and

charged nothing for collecting and delivering. This was held to be an undue preference against the complainants, by depriving them of their profits, which they alleged that they had made entirely by collecting and delivering, since it compelled customers virtually to employ the company for collecting and delivering, as well as for carrying from Reading to London, to the exclusion of the complainants. The court distinguished elaborately between separate interests being vested in the same company. Cockburn, C. J., said:—"It may be convenient, in the first place, to advert to a distinction, not always kept sight of in argument, between cases in which the interest of the company sought to be promoted by the regulation or act complained of, is one which arises with reference to the railway itself, as to which the question occurs; and those in which the benefit sought to be obtained by the company is one which has reference to interests distinct from those of the particular railway; as where, for example, the company are proprietors of another railway, or carry on some other business. In the latter class of cases it appears to us clear that the company must be taken to be, *quoad* the particular railway, in the position of third parties; and that they cannot, with a view to such separate interests, give an undue preference, or impose an unreasonable disadvantage, any more than they could do so to promote the interests of any other party. Thus, if a railway company, being proprietors of one line from A. to B., and of another line from C. to D., were, in order to obtain the custom of a particular individual on the first of those lines, on which they might be subject to competition from a rival line, to agree to convey his goods on the line from C. to D. at a cheaper rate than those of another person using only the latter line;—or if a railway company carrying on, in addition to its business as carriers on the line, that of carriers to and from the termini of the railway, were, with a view to obtain additional custom in the latter, to carry on the railway for those who employed them as

carriers to and from the railway at a lower rate than for those who did not;—in both these cases we should have no difficulty in holding that the company must be considered, as regards those separate interests, in the light of third parties; and that they cannot promote these at the expense of the right of the public to that equality on the particular railway which it was the intention of the act of parliament to secure. Greater difficulty and nicety arise in dealing with cases in which the purpose and effect of the thing complained of is the benefit of the company in their character of proprietors of a particular railway. In these cases the court might feel a greater reluctance to interpose, partly from an unwillingness to interfere with the parties in the management of their own affairs for their own advantage; partly from a disposition to give companies credit for acting on an enlightened view of their own interests as identified with those of the public; yet, if the court became clearly satisfied that the company were seeking to promote its own advantage, by establishing an inequality which was unreasonable under the circumstances, and operated unfairly and injuriously on particular individuals; or that it was affording to one person, or set of persons, an advantage which it would not afford to another under similar circumstances; this court would not hesitate to interfere to prevent such a result, although by so doing they might prevent the company from securing all the profit that it might otherwise derive from the use of its property. Thus, were a complaint made that a railway company, as between two intermediate stations, charged a higher rate than was due to the intermediate space in proportion to the charge made on the entire line of railway; this court, if it were made to appear that the disproportion was not justified by the circumstances of the traffic—in other words, was an undue prejudice or unreasonable disadvantage to those using the part of the railway in question—would interfere to set aside such an arrangement. So, again, if an arrangement were made by a railway com-

pany, whereby persons, bringing a larger amount of traffic to the railway, should have their goods carried on more favourable terms than those bringing a less quantity; although the court might uphold such an arrangement as an ordinary incident of commercial economy, provided the same advantage were extended to all persons under the like circumstances, yet it would assuredly insist on the latter condition, and would interfere in the case of any special agreement, by which the company had secured to a particular individual the benefit of such an agreement to the exclusion of others; or even where an attempt had been made, by keeping the agreement secret, to make it operate unduly to the prejudice of third parties. This reasoning appears to us effectually to dispose of the argument, that the court cannot interfere to prevent a railway company from fixing the rate of tolls to be taken on its railways, in such a manner as shall best promote its own interests, in cases where, by so doing, the company subject others to unreasonable disadvantage, or operates to their prejudice by giving undue preference to third parties. We proceed to consider the second ground taken by the defendants, which is, in substance, that, having the power to raise their rates of charge for carrying on their line, and having done so equally as regards all, they do not come within the statutory prohibition against undue preference or undue prejudice, by affording other accommodation in addition to that of carrying on their line. We think this argument rests upon two obvious fallacies: that of supposing that the charge in question is one made by the company, in reference to their character and interest with respect to the railway; whereas, in reality, the charge is made by them in a character and interest independent of the railway, namely, as carriers to and from the termini of the railway; and, secondly, that the company can convert that which is in reality a charge for collecting and delivering as well as for carrying, into one for carrying only, by affixing to it the latter denomination in their table of fares. It is true,

no doubt, that the company's acts give them power to impose their own rates of charge for the carriage of this description of traffic ; but these acts give them no power to impose tolls or charges for collecting and delivering ; and it is palpably an abuse of their powers if, under the name of a charge for carrying on their line, they impose, otherwise than with the assent of the parties concerned, a charge for a totally different thing ; and again, although the legislature has conferred the power of imposing rates and charges, it has annexed to this power the obligation of imposing such rates equally ; and the company cannot be permitted to evade this obligation, by colourably pretending that that is a charge for carriage only which is, in fact, a charge for other things as well as for carriage. The court is bound to look at the transaction in its true light, and cannot suffer itself to be diverted from its duty of interfering to prevent what in effect is such an injustice as it was the purpose of the legislature to prevent, because the transaction is attempted to be covered over by a transparent disguise. Looking, then, at the alteration in the tolls in its true light, we are of opinion that the arrangement is objectionable, both as an undue preference given on the one hand, and as an unreasonable disadvantage imposed on the other. It is an undue preference to the company in their separate capacity of carriers, other than on the line of railway ; inasmuch as they thereby practically secure to themselves the entire monopoly of the last-mentioned traffic, to the entire exclusion of the complainants and all others. It is an undue prejudice and an unreasonable disadvantage imposed upon the complainants ; inasmuch as it is plain that their goods, and those of all persons employing them, as indeed the goods of all persons other than those who employ the company to collect and deliver, must be subjected, as compared with the goods of the latter, twice over to the expense attendant on collecting and delivering if they employ others to collect and deliver

for them; or to an unnecessary charge if they require no such accommodation.

“On these grounds, we are of opinion that the case is one within the mischief and provision of the act; that it is our duty to interfere; and consequently this rule must be made absolute with costs.”

Thus, in *Garton v. Great Western Railway (e)*, the facts were substantially the same as those in *Baxendale v. Great Western Railway*. And the complaint was, that the respondents made the same charge for collecting, carrying, and delivering as they made for carrying alone; and, although the new fact appeared, which the court said had been kept carefully from them in *Baxendale v. Great Western Railway*, that the profit was made by the applicants in both cases in the carrying by means of the system of packed parcels, and not by the collecting and delivering; the court held, that the case of *Baxendale v. Great Western Railway* governed the subsequent one, on the principle that the public, as well as other carriers, were prejudiced by being obliged to employ the company for collecting and delivering, whether such services were required or not by the customer.

These cases have established some important principles, which have been the guiding rule of subsequent cases, and which may therefore be now stated shortly.

It has been said that they establish the principle that “a man shall not have that enforced upon him, and be made to pay for it, for which he has no occasion, and which operates injuriously to him, and preferentially to other parties” (*f*). This doctrine is, perhaps, slightly an extension of that which was laid down in the earlier cases under the statute, whence it appears that personal, without public, inconvenience, alone will not support an injunction, and that—

1st. A preference will not be ground for an injunction,

(*e*) 5 C. B., N. S. 669; 28 L. J. and Exeter Railway, 6 C. B., N. S. 158, C. P. 656; 28 L. J. 310, C. P.

(*f*) Byles, J., *Garton v. Bristol*

unless it have a tendency to produce public inconvenience as well as personal loss.

2nd. The fair interests of the company are to be considered; and where they offer similar advantages to all persons similarly circumstanced, there will be no undue preference, merely because, from the natural position of localities, the advantages of traffic are confined to the inhabitants of particular districts, unless other circumstances indicate a preference for classes or individuals.

3rd. A tariff, which is reduced in proportion to the quantity of traffic and length of transit, is good.

4th. Such a reduction is bad, if founded on a consideration which is distinct from the traffic in respect of which the preference is given.

5th. Private, and especially secret, agreements, which, from their nature, can be made only with particular classes or individuals, are bad.

In *Baxendale v. North Devon Railway (g)*, the respondents, in conjunction with the Bristol and Exeter Railway, had entered into an arrangement with the Midland and London and North-Western Railways, by which "Manchester packs" were to be carried at a lower rate, from Crediton to Barnstaple, than similar goods under similar circumstances, provided they were consigned to the agents of the several companies at Manchester and Bristol. An injunction was granted to enjoin the respondents to charge the same rate for Manchester packs from Crediton to Barnstaple as they charged for the like goods under any (?) circumstances.

In *Nicholson v. Great Western Railway (h)*, the respondents had entered into an agreement with the Ruabon Coal Company, by which the traffic of the latter was to be carried at a reduced tariff in consideration of their engaging to send "for ten years along the Great Western Railway, beyond the distance of one hundred miles, such a sufficient

(g) 30 L. T. Rep. 134.

(h) 5 C. B., N. S. 366; 28 L. J. 89, C. P.

quantity of coal during each year as would produce to the company for freight, terminals, waggon hire and break of gauge, a yearly gross revenue of 40,000*l.*, in fully loaded trains, at the rate of seven per week.” It was alleged, that this agreement operated prejudicially to the applicants, who were coal owners in the Forest of Dean, and who were charged a higher tariff; that the respondents had an interest in the Ruabon Coal Company, and that the agreement had been kept secret from the applicant; but both these latter statements were denied by the affidavits of the respondents; who averred, also, that they had offered a similar agreement under like circumstances, and subject to like conditions, to all other coal proprietors. It had been stated, generally, in the affidavits of the complainants, that it was impossible for them to enter into a similar agreement; but it had not been stated why it was impossible. The court refused the injunction, with costs, saying, that if they could have seen clearly that a scale of rates had been framed, with a view of favouring the Ruabon traffic, and prejudicing the Forest of Dean traffic, it would have been an undue preference: but that, under the circumstances, the applicants were suffering only from the inconvenience of their local position, and that the respondents had only consulted the fair interests of the company by reducing the tariff in consideration of a guarantee of a larger traffic, which the complainant could not give. But in a later and unreported case, which was compromised before judgment, the court intimated that, in such a case, the tariff must be regulated by the amount of the traffic; and that when one carrier guaranteed four thousand tons, and another could guarantee only two or three thousand tons, the latter was still entitled to a reduction proportioned to the smaller amount of his guaranteed traffic (*i*).

A subsequent application was made to the court in *Nicholson v. Great Western Railway*, to order a reference to an engineer or other referee, to ascertain whether the charges made to the complainant were fair and reasonable

(*i*) *Lee v. South-Eastern Railway*, 1859, C. P., MS.

in comparison with the lower charges which were made to the Ruabon Company. But it was held by Erle, C. J., and Keating, J., that, regard being had to the special circumstances of the case, there was no sufficient presumption that there was any inequality of charge: that the case of the complainant was answered by the affidavits of the respondents; and that the court ought not to appoint a referee under sect. 3, unless they were satisfied, which they were not, that he would perform the duty of referee better than the court. Williams, J., and Willes, J., thought that a referee ought to be appointed; and that it could not have been the meaning of the legislature that the company, who would necessarily have the last word always by their affidavits, should be able to frustrate an application by a simple denial and issue on oath. In consequence of this division in the court the rule dropped, and the application was refused (*j*).

In *Ransome v. Eastern Counties Railway* (*k*), the complaint was, that the defendants carried coals from Peterborough to one of certain adjacent districts at a rate below their published tariff. According to the tariff, when coals of not less than 200 tons were consigned to the particular district, they were taken at a reduced charge; and this tariff had been recognized by the court in a former case (*l*). It was now contended, that this tariff was infringed, and that the applicant, as a carrier from Ipswich to the same district, was unduly prejudiced, because the defendants, after receiving a full consignment of 200 tons at Peterborough, and conveying that amount to Cambridge; there for the convenience of the company's traffic, and with a fair regard to the difficulties of gradients and the cost of locomotive power, distributed the consignment into smaller quantities, and conveyed them at different times, and by different trains, into the district of ultimate consignment. The court

(*j*) *Nicholson v. Great Western Railway*, 3 L. T. Rep., N. S. 234. (*l*) *Re Ransome*, 4 C. B., N. S. 135; 27 L. J., 166 C. P., *supra*, p. 283.

(*k*) 8 C. B., N. S. 709; 29 L. J. 329, C. P.

held, that these facts disclosed no case of undue preference. Erle, C. J., said, that the tariff had been formed on the approved principle, that "a railway company have a right to lower their rates in proportion to large quantities of goods conveyed for long distances, this being for the accommodation of the public, and for their own profit and advantage. As to the question of competition, it is not the duty of the court to interfere. All that we can require is, that the company should hold out equal opportunities to all parties who may desire to use them." The court agreed in thinking, that, as the original consignment was of a quantity not less than 200 tons, it was immaterial how they were forwarded on. The rule was discharged, but without costs. If any of the coals had been left at the intermediate place, which was not the case, it seems that the injunction would have been granted.

In *Garton v. Bristol and Exeter Railway (m)*, there were three grounds of complaint :—

1st. That the defendants charged the complainants for forwarding packages by the van and passenger trains, from station to station, the same sum as the defendants charged the public for forwarding their goods, and also for collection and delivery.

2nd. That the Bristol station of the defendants was closed in the evening against the complainants at an early hour, subsequently to which the defendants received goods which had been collected by their agent.

3rd. That the complainants were charged at a higher rate for the carriage of goods from Bristol to Bridgewater, and *vice versâ*, than certain persons at Bridgewater were charged for similar goods under similar circumstances.

The first ground of complaint was proved and held to fall within the principles of *Baxendale v. Great Western Railway (n)*, and *Garton v. Great Western Railway (o)*, that a railway company has no right to charge for con-

(m) 6 C. B., N. S. 639 ; 28 L. J. 306, C. P.

(n) 5 C. B., N. S. 336 ; 28 L. J. 81, C. P.

(o) 5 C. B., N. S. 669 ; 28 L. J. 158, C. P.

veying to the railway a person who does not require such accommodation from the company.

The second ground was also proved, and held to be a case of undue preference.

The third ground rested on the fact, that the railway company had undertaken to carry the heavy merchandize of the grocers and ironmongers of Bridgewater, generally, at lower charges than they took from the public generally for such traffic.

It was suggested, although it did not appear on the affidavits, that this arrangement was made to enable the railway company to compete successfully with the water carriage of the district. But the court thought that there did not appear to be sufficient ground for this arrangement; that the affidavits of the defendants were unsatisfactory; and that on this ground also, as on the other two, the injunction ought to be granted. But the court intimated that a *bonâ fide* arrangement of this sort, with a view of meeting competition, if held out to the public generally, and not made a matter of private arrangement with particular persons, might be good.

Where a railway company were bound by their private act to keep two distinct navigations in order, and allowed one to fall out of repair, in consequence of which neglect the traffic was diverted from it to the other; an injunction against undue preference of themselves was refused. The 17 & 18 Vict. c. 31, applies to a preference in respect of a single navigation, and not to the case of distinct and separate navigations (*p*). Nor will an injunction be granted where a charge is not higher than a private act permits (*q*).

The cases which have arisen under the 17 & 18 Vict. c. 31, s. 2, and, so far as practicable, the results which are deducible from them, have now been stated. It remains to state some miscellaneous points, chiefly of procedure, which have been also incidentally involved in them.

(*p*) *Bennett v. Manchester, &c.*
Railway, 33 L. T. Rep. 233.

(*q*) *Attorney-General v. Birmingham, &c. Railway*, 2 Railw. Cas. 124.

The Affidavit.

This must not be vague, but must set out distinctly a public as well as a personal inconvenience, as the actual or probable result of the grievance. Such at least was the doctrine of the court in the earlier cases under the act (*r*): and, although this doctrine has not been stated so expressly in later cases, in some of which it seems to have been thought, that a personal prejudice, without a public inconvenience, may be ground for an injunction (*s*): the earlier doctrine appears to be the safer law.

Where a rule to show cause has been obtained on affidavits, the court will not allow the complainant to file additional affidavits to strengthen the rule, even though the other side have not filed affidavits in reply, nor taken any other steps than giving notice that the rule will be opposed. But the court, in its discretion, may allow the applicant to abandon the rule and move a new one: and will also suspend the costs of the abandoned rule until the new one has been disposed of (*t*). It seems, also, that the court will judge of the facts of the case from the affidavits of complaint and answer alone: that, where the allegations of complaint are denied in fact by the respondents, the rule will drop, and the complainants will not be allowed to file affidavits in reply: and that in such a case the Court of Common Pleas is equally divided in opinion whether the facts ought to be referred to the Master, an engineer, or other referee (*u*). But when the affidavits disclose circumstances of a special nature, which are essentially matters of arithmetic and calculation, the court will refer the case to the Master, who will take the evidence and report thereon

(*r*) *Re Marriott v. London and South-Western Railway*, 26 L. J. 155, C. P.; *Caterham Railway v. London and Brighton Railway*, 26 L. J. 161, C. P.; *Ex parte Painter*, 2 C. B., N. S. 705; *Ransome v. Eastern Counties Railway*, 27 L. J. 166, C. P.

(*s*) *Nicholson v. Great Western Railway*, 28 L. J. 89, C. P.; *Byles, J.*, in *Garton v. Bristol and Exeter Railway*, 28 L. J. 310, C. P.

(*t*) *Ransome v. Eastern Counties Railway*, 2 L. T. Rep., N. S. 237.

(*u*) *Nicholson v. Great Western Railway*, 2 L. T. Rep., N. S. 234.

to the court. On the report the court will act with due regard to the conflicting rights and interests of the public and the company (*x*).

The affidavit of complaint ought to disclose a grievance which is strictly in accordance with the facts: and a mistake or misdescription of a grievance will be fatal, even where a substantial grievance of an analogous nature is disclosed on the argument. Where a real ground of grievance is stated, the court will probably mould the rule to give proper redress, even while they refuse the whole amount of the relief which is prayed for (*y*).

When a rule has been disposed of, the court generally will not allow it to be re-opened, on affidavits of new facts, although it is in their discretion to do so (*z*).

Costs.

In the first application under 17 & 18 Vict. c. 31, s. 2, the rule appears to have been made absolute with costs, although it was not moved with costs (*a*); but it has been since laid down, that costs will not be given when they are not asked for by this rule (*b*). When the rule is moved with costs it will either be made absolute with costs (*c*), or discharged with costs (*d*). When a complainant demands much more relief than he is entitled to, the court will refuse him his costs. On the other hand, when the company is partially in the wrong, they must bear their own costs (*e*). Since, also, the court has even threatened to grant an injunction, if it should even appear that an

(*x*) *Nicholson v. Great Western Railway*, 28 L. J. 89, C. P.

(*y*) *Cooper v. London and South-Western Railway*, 27 L. J. 324, C. P.; *Ransome v. Eastern Counties Railway*, 27 L. J. 166, C. P.; cf. *Crickmar v. Eastern Counties Railway*, 26 L. T. Rep. 220; *Baxendale v. Great Western Railway*, 28 L. J. 72, C. P.

(*z*) *Baxendale v. Great Western Railway*, 32 L. T. Rep. 257; 28 L. J.

85, C. P., note.

(*a*) *Ransome v. Eastern Counties Railway*, 26 L. J. 91, C. P.

(*b*) *Marriott v. London and South-Western Railway*, 26 L. J. 154, C. P.

(*c*) *Baxendale v. Great Western Railway*, 28 L. J. 69, C. P.

(*d*) *Nicholson v. Great Western Railway*, 28 L. J. 89, C. P.

(*e*) *Oxlade v. North-Eastern Railway*, 26 L. J. 129, C. P.

attempt had been made to keep a private agreement, between the company and a particular customer, secret from the public (*f*), it is probable that costs will be granted to the complainant in all cases in which such an attempt appears to have been made (*g*).

In connection with this subject, it is right to notice a class of cases which, as having arisen under private railway acts, must be read with due reference to their special language and application. It is difficult to extract any principle from them, except a general conclusion that, even independently of the 17 & 18 Vict. c. 31, s. 2, the courts will not recognize any right in railway carriers to favour one class of customers at the expense of another; that the charges for like carriage of goods, under like circumstances, must be the same; and that, although the charges may be raised in proportion to any real extra risk, a mere difference of packing for the convenience of the sender; such as the inclosure of several small parcels in one large one; will not justify an increase of charge, on a package of such parcels, beyond that which is usually paid on a single package of identical, or substantially similar, bulk, quality, and weight.

In *Pickford v. Grand Junction Railway Company* (*h*), the defendants, by their special acts, were empowered to carry on a fixed scale of *reasonable* and *equal* charges; and two questions arose: First, on a scale which fixes a lower

(*f*) Per cur., *Baxendale v. Great Western Railway*, 28 L. J. 84, C. P. 89, C. P. 5 C.B., N.S. 366; 28 L. J. 89, C. P.

(*g*) *Nicholson v. Great Western* (*h*) 10 M. & W. 399.

charge for goods above a specified weight, and a higher charge on goods under that weight, can a package, above the specified weight, consigned to one person, but composed of several parcels, for different consignees; and each of which parcels is under the *specified weight*; be charged on the higher scale, either as an entire package, or as if each of such parcels had been sent separately? This question was decided in the negative. Parke, B., in delivering the judgment of the court, said: "The charge is, no doubt, to be varied according to the trouble, expense, and responsibility attending the receipt, carriage, and delivery of different articles; and for small parcels more ought to be paid than a proportionate part, according to weight, of the price of larger parcels of the same commodity, by reason of the greater trouble in receiving, despatching, and delivering them, and their exposure to a much greater risk of abstraction or loss. But if all the small packages are united in one large package, and delivered to the carrier in that package consigned to one person, the trouble and responsibility are apparently reduced to precisely the same degree as if all the articles, contained in the package, were the property of the same owner, and intended to be delivered to him;" and it was held, that the carrier had no right to charge as for separate parcels, "because neither the trouble, expense, nor responsibility was the same as if the parcels had been separate."

The second question was, Where a carrier fixes the same charge for the carriage of goods, whether he delivers at his own terminus or at the residence of the consignee, is such a charge reasonable and equal?

This question was also decided in the negative; and it was held, that where the consignee is willing to receive the goods at the carrier's usual terminus, the consignee is entitled to a deduction from the ordinary charges, corresponding to the amount of expense and labour which is thus saved to the carrier.

In *Parker v. Great Western Railway Company* (i), the defendants had similar powers by their acts to carry for fixed and *reasonable* charges; and had established one tariff for the public, and another tariff for carriers, by whom the defendants were employed. The latter tariff was on a lower scale, because the carriers were allowed to perform certain duties for themselves, by which the defendants were relieved of a proportionate amount of trouble and expense. The defendants had refused to allow the plaintiff, who was a carrier, the privilege which they had granted to other carriers; and they claimed to perform for him the duties which they were accustomed to perform for the public generally, and to charge him similarly.

It was held, that, as between the defendants and the public, there was nothing unreasonable in the tariff; but that, as between the defendants and the plaintiff, the plaintiff was entitled to the same privilege as other carriers; and, on availing himself of it, was liable only for the less charges which were payable by carriers.

In the second part of the case it appeared, that where several packages were addressed to the same consignee, the defendants had been accustomed to charge according to the aggregate weight of such packages when delivered to the defendants by one of the public; but, when such packages, similarly addressed, were delivered by a carrier to the defendants, the defendants had been accustomed to charge for them as separate packages, unless it appeared clearly that more than one package was going to the same consignee; in which case the packages, whatever their number might be, were charged according to their aggregate weight. But generally, when goods were delivered to the defendants by a carrier, the defendants treated him as consignor and consignee, and charged accordingly.

It was held, that a tariff formed on these principles, and distinguishing arbitrarily between carriers as a class and the public generally, was unreasonable and bad; and that

(i) 7 M. & G. 253.

the plaintiff, as a carrier, was entitled to recover from the defendants the additional sum which he had paid under protest when charged as one of the public, and not as a carrier; and also the additional sum which he had paid, similarly under protest, when charged as a carrier, as distinguished from one of the public. The judgment on both points proceeded on the principle, that it is unreasonable to withhold, from a member of a class, a privilege which is granted to a class; and also unreasonable to withhold from a class a privilege which is granted to a community. It was also held, that special acts which confer a particular advantage on a class, such as railway carriers, will be construed strictly for the benefit of the public and of customers "against the parties obtaining them, and liberally in favour of the public."

The above cases have been followed by several, which it is unnecessary to discuss, because they involve similar questions of the construction of particular railway acts. On the whole they may be considered to have confirmed the principles, which have been stated above as the criterion and measure of a carrier's charges; and especially the principle, that, under a statutory provision that a carrier's charges are to be reasonable and equal for all classes and members of the public, all attempts to institute different tariffs for different classes are illegal and inoperative. These cases will now be annexed in their order of date.

By 5 & 6 Will. 4, c. cvii, the defendants were incorporated for the purpose of making and working the Great Western Railway (*k*). By s. 163, all persons were empowered to use the railway, with proper carriages, upon payment of such rates and tolls as the act authorized to be taken. By s. 164, tolls, none of which exceeded 3*d.* per ton per mile, were allowed to be taken by the company

(*k*) *Parker v. Great Western Railway*, 11 C. B. 545; 21 L. J. 57, C. P.

for tonnage of articles to be conveyed on the railway. By s. 166, the company were empowered to provide power for drawing articles on the railway, and to receive such sums for the use of such power as they should think proper, in addition to the other rates, tolls, or sums by the act authorized. By s. 167, the company were authorized to use locomotive or other power; and in carriages drawn thereby to convey goods, and to make such reasonable charges for such conveyance as they might determine upon, in addition to the rates or tolls by the act authorized. By s. 171, the company were empowered to make such orders for fixing a sum to be charged in respect of small parcels not exceeding five hundredweight as to them should seem proper; "provided that the said provision shall not extend to articles sent in large aggregate quantities, though made up of separate parcels, such as bags of sugar, coffee, meal, and the like; but only to single parcels unconnected with parcels of the like nature, which may be sent at the same time." By s. 175, it was provided, that the rates and tolls, to be taken by virtue of that act, should be charged equally and after the same rate per ton per mile in respect of the same description of articles; and that no reduction or advance in the same should, either directly or indirectly, be made, partially, or in favour of or against any particular person; but that every such reduction or advance should extend to all persons using the railway, or carrying the same description of articles thereon. By 1 & 2 Vict. c. xcii, s. 44, the company were empowered to receive a reasonable charge for the loading and unloading or weighing any articles which they might be required to load, unload, or weigh. By 7 & 8 Vict. c. iii, s. 50, the company were empowered, whenever they should act as carriers, or provide locomotive power or carriages for the conveyance of goods, to charge for such power and carriages such sum (not exceeding the sums, if any, limited by former acts) as they should think expedient; provided that such charges should be made

equally to all persons in respect of all articles of a like description, and conveyed in a like carriage over the same portion of the railway, and under the like circumstances; and no reduction or advance in any of such charges should be made partially, either directly or indirectly, in favour of or against any particular person.

The plaintiff, a carrier, sought to recover, in an action for money had and received, the amount of sums alleged to have been overcharged by the defendants for carriage of goods by their railway. 1. In addition to the rates fixed by the company for the carriage of goods by their scale-bills, they charged the plaintiff a sum for "loading, unloading, covering, and risk of stowage." The plaintiff never required the company to load or unload. Held, that the rate fixed for "conveyance," where the company acted as carriers under s. 167 of 5 & 6 Will. 4, c. cvii, included the above charges; and that s. 44 of 1 & 2 Vict. c. xcii, did not apply to the case where the company acted as carriers in conveying the goods of other persons, but only to cases in which they did not act as carriers, but performed the duty of loading and unloading for other persons carrying goods, being requested by them to perform it. 2. Up to a certain time the company had made an allowance of 10*l.* per cent. to the plaintiff and other carriers for requiring them to sign certain ticking-off notes and declarations whenever they delivered goods to be carried by the company. In order to make these, some trouble was required in classifying and weighing the goods. This allowance was discontinued after the decision in *Parker v. The Great Western Railway Company* (1). The same notes were not required from persons not being carriers. Held, that the requiring such additional matter from carriers, without allowance, did not entitle them to an action for money had and received, as for an overcharge to them, as compared with the rest of the public, in violation of 5 & 6 Will. 4, c. cvii, s. 175; but that it was the

(1) *Supra*, p. 299.

subject of an action for damages for any injury sustained in consequence. 3. The plaintiff and other carriers were in the habit of making charges for booking parcels. The company entered into an agreement with E. S. to convey goods to and from their station for 1,000*l.*, and to relinquish booking fees, which he did. Held, that assuming the practice of booking without fees to be continued by E. S., this was no violation of the provision in s. 175, the plaintiff not being bound to charge anything for booking, but doing it merely for his own benefit. 4. The company charged the plaintiff and other carriers fifty per cent. more for "packed parcels" than they charged the public in general. Held, that this was a violation of the proviso in the 5 & 6 Will. 4, c. cvii, s. 175, and in the 7 & 8 Vict. c. iii, s. 50, and that the plaintiff was entitled to recover back the sums so paid. 5. The company, by a scale-bill, in force up to June, announced, that in miscellaneous goods, not being aggregate of "one kind or class," they would charge 2*d.* extra. Held, that, by having used the words "kind" and "class" as synonymous, they were bound by their own definition, and could not charge goods of the same class in their scale-bill as goods unconnected with goods of a like nature, within the meaning of the proviso in s. 171 of the 5 & 6 Will. 4, c. cvii. By a subsequent scale-bill, the goods were divided into "classes," without any miscellaneous class, and it was announced that a parcel rate would be charged on all parcels under one hundredweight. When several parcels in one lot of goods of the same class, but of different kinds, each separately being under one hundredweight, but in the aggregate above one hundredweight, were directed to one consignee (as was generally the case where the company carried them for the public), the company charged tonnage rate on such lot of parcels; but when a similar lot of parcels was delivered by carriers, directed to different consignees, the company charged each separate parcel at the parcel rate. Held, an unequal mode of

charging within s. 50 of the 7 & 8 Vict. c. iii; and that the fact of being directed to the same or different consignees does not prevent goods from being goods carried, "under the same circumstances," within that section. The mere division of goods into "classes" in the scale-bill would not enable the plaintiff to treat all the goods, in a particular class, as goods "of a like nature," within s. 171 of the 5 & 6 Will. 4, c. cvii, or as goods of a "like description," within s. 50 of the 7 & 8 Vict. c. iii. 6. Held, that where several parcels of goods of the same kind were sent together, and amounted to a greater weight than five hundredweight (or the weight fixed upon by the company as the dividing point between the tonnage and parcels rates), they could not be charged an additional sum as "miscellaneous goods," or at the parcel rate, within s. 171 of 5 & 6 Will. 4, c. cvii. 7. Held, that in addition to the toll of 3s. per cent., which the company were empowered to take by s. 164 of the 5 & 6 Will. 4, c. cvii, for tonnage, they were also entitled, by s. 167, to charge a reasonable sum for "conveyance" of goods as carriers, including loading, unloading, risk, &c., and were not restricted to "such a sum as they should think expedient for locomotive power and carriages," within s. 50 of the 7 & 8 Vict. c. iii. (assuming that to be the true construction of the last-mentioned section). 8. Held, that, according to the proper construction of the 5 & 6 Will. 4, c. cvii, s. 171, where several small parcels of a like nature, being altogether less than one hundredweight (the scale-bill fixing that as the limit), were delivered in one lot, directed to different consignees, the company were entitled to charge them as one "small parcel" within that section at the parcel rate; and where such several small parcels were not of a like nature, though in the same "class" in the scale-bill, the company were entitled to charge each of them as a separate parcel at the parcel rate.

The Great Western Railway Company, before the 7 & 8 Vict. c. iii, came into operation, was obliged, by the 2 & 3 Vict. c. xxvii, s. 24, to charge for carriage to all persons equally; but they charged P., a carrier, differently from and more than the public. Held, in accordance with *Parker v. The Great Western Railway Company*, that the overcharge was recoverable as money received to the carrier's use. The 7 & 8 Vict. c. iii, by sections 48, 49, and 50, repealed the 2 & 3 Vict. c. xxvii, s. 24, and re-enacted it, with the difference, that, in section 50, the words "under like circumstances" were introduced. The company continued to charge P. more than the public. Held, that he might recover the overcharge, the fact of his being a carrier only not rendering the circumstances unlike.

Under the company's original act, 5 & 6 Will. 4, c. cvii, s. 171, the company was authorized to fix the sums to be charged for small parcels, provided that they were not sent in large aggregate quantities, made up of separate and distinct parcels. The company published scale-bills, in which they specified divers classes, containing different kinds of goods; and one class comprised miscellaneous goods, "not being aggregate of one class or kind," which were charged at a higher tonnage rate, with an extra charge for each parcel. The company charged P. under the miscellaneous class for aggregate goods, which, though of different kinds, were within the same class in the scale-bills. Held, that this was an overcharge, and that the word "class" must be taken to mean something more than "kind," and to apply to the classes mentioned in the scale-bills. Held, also, with regard to all the foregoing overcharges, that it made no difference that the separate parcels, which were all to be delivered to the carrier or his agents at the end of the journey, were destined for different ultimate consignees.

P.'s servants assisted the company's servants in loading, unloading and weighing, but not at the company's request, and the public gave no such assistance. The company,

before the decision of *Parker v. The Great Western Railway Company*, had allowed carriers ten per cent. for such assistance, and P. in this case claimed a similar deduction. Held, that P. was not entitled to any deduction on this ground. The company, before the decision in *Parker v. The Great Western Railway Company*, had entered into an agreement with K. to allow him ten per cent. discount; but after that decision they refused to make the allowance. K. brought an action and recovered a verdict for the ten per cent., which the company paid accordingly. P. claimed the ten per cent., on the ground that he and K. had been charged unequally, K. having been allowed that amount. Held, that this was not an allowance which made the charge unequal. P. paid the overcharges under protest, and, after a notice of action to the company, he sent in a claim, in writing, of interest. It was objected, that, as the notice of action did not contain a claim for interest, it could not be recovered; but as there was no plea of want of notice of action, and as the action and all matters in difference had been referred to an arbitrator,—held, that the arbitrator might award interest under the 3 & 4 Will. 4, c. 42, s. 4 (*m*).

By their special acts, the defendants were entitled to charge for goods carried on their lines at certain rates per ton, and to charge a higher rate for such parcels not exceeding five hundredweight, provided that “articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal, and the like, shall not be deemed small parcels; but such term shall apply only to single parcels or separate packages.” Under this clause it was held, that the defendants might charge, as separate parcels, packages of articles of like classes, but which were not separate packages of one article, which were each less

(*m*) *Edwards and another, assignees of Parker v. Great Western Railway*, 11 C. B. 588; 21 L. J. 72, C. P.

than five hundredweight, and consigned to one consignee by the plaintiff, a carrier. This was on the ground that the proviso applied only to articles of such a nature as were usually made up in separate packages on account of their quantity.

The plaintiff sent also a parcel of coffee less than five hundredweight; and afterwards, on the same day, another parcel of coffee, both consigned to himself and for the same train. When the first was left, the plaintiff gave notice, that, probably, he would send more; but it was not received on any special terms. It was held, that these might be charged as separate parcels.

Under a power to charge a certain rate for "all cotton and other wools, drugs, and manufactured goods;" it was held, that these words included only such articles as in popular language are called manufactures, and not all goods on which human skill is employed.

The company had also agreed with agents to deliver and collect goods for them, charging the public a small additional charge for conveyance to the railway. To these agents the company allowed, in addition, a sum out of the receipts of the railway. The plaintiff, who collected and delivered his own parcels, complained that, in effect, the arrangement caused his goods to be charged higher than those sent through the agent, and that the difference was an overcharge. By their act the company was to charge all persons equally for conveyance; but there was a proviso that they might make agreements as to the collection and delivery of merchandize; and there was an appeal given by the act to the sessions by any one prejudiced against any arrangement giving special facilities to others. Under these enactments, it was held, that the agreement with the agents, against which there had been no appeal, did not render the charges to the plaintiff overcharges (*n*).

(*n*) *Parker v. Great Western Railway*, 6 El. & Bl. 77; 25 L. J. 209, Q. B.

By the 13 & 14 Vict. c. lxi, s. 14 (the Great Northern Railway Act), the company have power to charge for the carriage of such parcels, not exceeding five hundredweight, "any sum which they may think fit." By the 8 & 9 Vict. c. 20, s. 90 (Railways Clauses Consolidation Act), which is incorporated in the special act, the company had power to vary the tolls so as to accommodate them to the purposes of their traffic, provided that such power of varying should not be used for the purpose of prejudicing or favouring particular parties. It was held, that the company were bound to charge all persons alike, and that they could not charge a common carrier more than the rest of the public. The court held, that they were bound by the cases already cited; that the company might increase their charges according to the increase of risk and liability, but that they cannot make any difference between individuals. Martin, B., concurred, and said that he should be very sorry to make any minute distinction between the words of two acts of parliament which were intended to carry out the same object (*o*). It appears from the subsequent case of the same name (*p*), that the clause empowering the company to charge "any sum" for carriage means any reasonable sum (*q*). In that case the substantial question was, whether a carrier may charge more for a package containing parcels belonging to different consignees, than for a package containing parcels belonging only to one consignee; and it was suggested that the charge ought to be higher, since the risk was greater, owing to the liability of the carrier to be sued by the different owners of the several parcels. But the court held that there was no real increase of risk, nor difference between this case and the preceding one.

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| <p>(<i>o</i>) <i>Crouch v. Great Northern Railway</i>, 9 Exch. 556; 23 L. J. 148, Exch.</p> <p>(<i>p</i>) <i>Crouch v. Great Northern Rail-</i></p> | <p>way, 11 Exch. 742; 25 L. J. 137, Exch.</p> <p>(<i>q</i>) <i>s. v. Williams, J.</i>, 27 L. J. 297, C. P.</p> |
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Baxendale and others v. The Eastern Counties Railway Company (g).—A railway company had power by their act to charge any rate they thought proper for parcels under one hundredweight, while, by another section, they were to charge rates and tolls equally, and to make advances and reductions of rates without partiality. The company charged the plaintiffs, the only common carriers on their line, certain rates for parcels under one hundredweight; but if there were various small parcels of the same article, though loose, delivered at one time and directed to the same person, amounting to more than one hundredweight, they weighed and entered them in the bulk, and charged the lower or tonnage rate; but if the parcels delivered at the same time were directed to different persons, they weighed and entered them separately, and charged the higher or small parcels rate, even although the whole were delivered to the plaintiffs at the end of the journey. If among many parcels there were several directed to one person, exceeding together one hundredweight, they were lumped and charged the tonnage rate. Held, that, whether the section as to equality applied to the small parcels clause or not, there was nothing unreasonable in charging the higher rate, when the parcels, though all sent and received by the plaintiffs, were directed to different persons; and that the plaintiffs could not recover back the difference between the lower and the higher rates, which latter they had paid under protest.

Piddington v. The South-Eastern Railway Company (r).—The defendants were incorporated for the purposes of making and working the South-Eastern Railway; and by the 6 Will. 4, c. lxxv, s. 133, were empowered to fix the sum to be charged by them, in respect of small parcels not exceeding one hundred pounds weight each, as to them

(g) 27 L. J. 137, C. P.

(r) 5 C. B., N. S. 111; 27 L. J. 295, C. P.

should seem proper, "provided always, that the provisions hereinbefore contained shall not extend to articles, matters, or things sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, &c., and the like, but only to single parcels unconnected with parcels of a like nature, which may be sent upon the railway at the same time." By 2 Vict. c. xlii, s. 17, it is enacted, "that the charges by the above act (among others) authorized to be made for the carriage of any goods, &c., to be conveyed by the said company, or for the use of any steam power or carriage to be supplied by the said company, shall be at all times charged equally to all persons, and after the same rate per mile, or per ton per mile, in respect of all goods, &c. of a like description, conveyed or propelled by a like carriage or engine passing on the same portion of the line," &c. Held that, reading these two sections together, the defendants had not an absolute power to charge what they pleased for the carriage of packages not exceeding one hundred pounds weight. Where, therefore, the plaintiff, a carrier, had sent by the defendants' railway a number of "packed parcels," *i. e.* parcels consisting of a number of smaller parcels packed together, for which the defendants had charged, and the plaintiff had paid, double the rates which they would have charged for the same goods when not packed; and the jury found that there was no increased risk in the carriage of the parcels when so packed: held, that such double charge was unlawful, and that the plaintiff was entitled to recover the sum which he had paid in excess.

In *Garton v. Bristol and Exeter Railway* (s), the defendants were authorized under their principal private act (6 Will. 4, c. 36, s. 178) to make reasonable charges for the conveyance of goods and passengers on their railway, not exceeding a certain sum. By a subsequent act (8 & 9

(s) 4 H. & N. 33.

Vict. c. 155) they were empowered to make a junction railway and three branch railways; and, by sect. 19 of that act, they were not to charge more than a certain sum in respect of goods "conveyed on the *railway*." The company published a list of goods in five classes, by which packed parcels were to be charged in the fifth class, with an addition of fifty per cent. The plaintiff, a carrier, sent a "packed parcel" to be carried from Bristol to Bridgewater, on the main line. It contained a cask of spirits; but it did not appear that it caused extra risk. The company charged the public generally in the fifth class for such parcels, without the fifty per cent.; but charged the plaintiff in the fifth class with the fifty per cent. The court held, that the word "*railway*" in the second act applied to the whole line of railway, and not only to the junction and branch lines; and that the fifty per cent. additional charge to the plaintiff was unequal and unreasonable. Martin, B., said: "No doubt there is extra risk in some packed parcels, and for which the company would have a right to extra charge; for instance, if soda water, one of the articles mentioned in the rate bill, was packed with silk, which is another article, it is not improbable that the silk might be injured, and the company would be responsible; therefore, it is reasonable that in some cases an extra charge should be made. As a general rule I am disposed to lay down that no extra charge should be made for packed parcels; though for such as contain liquids some extra charge would not be unreasonable: but it is certainly unreasonable to make different charges to different persons for the same packed parcels." Channell, B., said: "The company are bound to charge all persons equally, and are not entitled to raise the charge to carriers in respect of packed parcels. We are bound by the authority of decided cases; and this point has been already decided. Then the question is, whether one package, containing spirits, being included in the parcel, may not, in some degree, have added to the risk. I cannot see that the extra charge of fifty

per cent. was warranted. If the charge is *prima facie* unequal, that must be got rid of by showing an increased risk." This case proceeded to the Exchequer Chamber on the question only, whether the word "railway," in the second act, applied to the whole line, or merely to the junction lines and branches; and the judgment of the Court of Exchequer was affirmed (*t*).

Pegler *v.* The Monmouthshire Railway and Canal Company (*u*).—A railway company, by their special acts of parliament, were empowered to demand for the use of their railway, in respect of the tonnage of flour conveyed upon the same, where locomotive power and trucks were provided by the company, a sum not exceeding 3*d.* per ton per mile; and for articles conveyed on the railway for a less distance than four miles, the company may demand, in addition to the prescribed tolls for conveyance, a reasonable charge for the expenses of stopping, loading and unloading. The plaintiff sent flour, to be carried by the company, a distance of nine and a half miles, which they carried accordingly, and claimed to be paid for it a toll charge at the rate of 3*d.* per ton per mile, and also a sum of 12*s.* 6*d.*, as a terminal charge in respect of services performed, facilities rendered, conveniences provided and expenses incurred in and about the receiving and delivering of the flour at the company's stations; such as receiving the flour by the company's servants, weighing, invoicing and loading it on their trucks; for the use of their station, yards, sheds, platforms, gas-lights, making entries in books, by their clerks and agents; of receiving and delivering, and the risk in loading, carrying and unloading. The plaintiff paid the toll charge, and refused to pay the terminal charge; but, as the company insisted upon it, he paid it under protest, and brought this action to

(*t*) *Garton v. Bristol and Exeter Railway*, 1 H. & N. 831, Sc. Cam. (*u*) 1 L. T. Rep., N. S. 331.

recover it back again. Held, that the railway company were not empowered to make this terminal charge, and that they could not do so without a special agreement for the purpose; but that they were not obliged to render to the plaintiff, or any other person, all the services, conveniences and facilities they had rendered, without remuneration.

Where a railway has been formed since 8th May, 1845, it is empowered to take tolls under the "Railways Consolidation Act," 8 & 9 Vict. c. 20, s. 90, which, after reciting that—

"Whereas it is expedient that the company should be enabled to vary the tolls upon the railway, so as to accommodate them to the purposes of the traffic; but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties; or for the purpose of collusively and unfairly creating a monopoly either in the hands of the company or of particular parties:" enacts that—

"It shall be lawful for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or any portions of the railway, as they shall think fit: provided, that all such tolls shall be charged equally to all persons, and after the same rate, whether per ton per mile, or otherwise, in respect of all passengers, and of all goods and carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the same line of railway, under the same circumstances; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the railway" (x).

(x) Cf. *Reg. v. Grand Junction Canal Company*, 3 Railw. Cas. 14.

CHAPTER XV.

ON INLAND CARRIERS BY WATER.

THIS concluding chapter is limited, as the above title, and that of this treatise indicate, to the subject of carriage by water on *inland* navigable *rivers* and *canals*; and it is necessary to make this statement, in order that it may not be supposed that it is intended to treat of the distinct, and more extensive, subject of carriers by sea.

At common law, carriers by water, whether by sea, or by inland navigation, are liable generally to all the duties, and have the same rights, which have been attributed, in the foregoing chapters, to carriers by land, whether common or special.

In *The Proprietors of the Trent Navigation Company v. Wood* (a), Buller, J., said: "As to the general principle, there is no distinction between a land and a water carrier;" or, in other words, as Sir William Jones has said, between a *waggon* and a *barge*; and therefore it was held, in an early case, that a common hoyman is responsible for goods to the same extent as a common land carrier (b). So he is under the same obligations as to carriage, and custom of delivery (c). Where goods were damaged by rats gnawing a hole in a hoy, the carrier was held liable, as a land carrier, for negligence (d). So, in an old case, where a waterman, who was engaged to carry a horse, overloaded his boat, by which the boat was upset

(a) 3 Esp. 132.

(c) *Wardell v. Mourillyan*, 2 Esp.(b) *Rich v. Kneeland*, Cro. Jac. 693.

330; cf. 12 Mod. 410.

(d) *Dale v. Hall*, 1 Wils. 281.

and the horse drowned; he was held liable, as a carrier, for negligence (*e*).

In *Richardson v. Sewell* (*f*), Lord Ellenborough suggested, that at common law, there is no difference generally between the liabilities of carriers by land and by sea, "except that at sea the acts of God, which give rise to the accidents excepted, are multiplied beyond those on land: and therefore many things at sea are excepted against, which cannot happen by land." Nor is the language of Story, J., at variance with this view, when he says, that common carriers are generally of two descriptions—first, carriers by land; second, carriers by water—and proceeds: "Of the latter description are the owners and masters of ships, whether they are regular packet-ships, or carrying smacks, or coasting ships, or other ships carrying on general freight. So are the owners and masters of steam-boats, engaged in the transportation of goods for persons generally for hire. So are lightermen, hoymen, barge owners, ferrymen, canal boatmen, and others employed in the same manner" (*g*). The learned commentator is manifestly dividing carriers here into classes according to the different media of transit; but without intending to establish any general distinction between either the duties or rights of land and water carriers, which depend on the same general principles, whether the carriage be by land or water, or even by air and balloons. But there appears to be no authority for a subsequent doctrine of the learned commentator, where he apprehends a distinction between the case of a hoyman, or ferryman, plying for occasional jobs, and that of a carman or cabman. It is clear, as is admitted, that the latter, not plying regularly from one place to another, is not a common carrier (*h*). But in a similar case the learned author states that a hoyman or

(*e*) 22 Ass. 41; *Williams v. Lloyd*,
Sir W. Jones, 180; cf. *Forward v.*
Pittard, 1 T. R. 27.

(*f*) 2 Sm. 205.

(*g*) Story on Bailments, sect. 496.

(*h*) *Brind v. Dale*, 8 C. & P. 207.

waterman is a common carrier, and cites *Lyon v. Mells* (*i*), which does not appear to support any such doctrine; nor is there, it is conceived, any ground for supposing a distinction between the cases; although there appears to be much force in the suggestion that, on principle, a carrier who carries, whether by land or water, professionally, although occasionally, as required, for hire, ought to be considered as much a common carrier, as one who carries regularly from one fixed terminus to another (*j*).

It may, therefore, be taken as clear, at common law, that a carrier by water is liable, either absolutely as a common carrier, or for negligence as a special carrier, according to the rules which govern the duties and liabilities of land carriers (*k*). Thus, in *Morse v. Slue* (*l*), it was held, on deliberation by the court, that the owner of a ship, from which freighted goods are robbed or taken by violence, unless the robbery be by pirates, is liable either as an insurer, or for negligence; and it was considered that, generally, there is no difference between the liability of a hoyman and that of a common carrier, or innkeeper. So, in *Sutton v. Mitchell* (*m*), where fresh-water pirates broke into a vessel lying in the Thames, and stole a quantity of dollars, it was not disputed that, independently of the statute of 7 Geo. 2, c. 15, a carrier by water is liable for thefts and robberies. Similarly it is clear that, independently of the 26 Geo. 3, c. 86, s. 2, by which owners of ships are freed from liability for losses by fire, all carriers by water are liable at common law for such losses to the same extent as land carriers.

As the cases in which it has been attempted to draw a distinction between the liabilities of carriers by water and

(*i*) 5 East, 439.

(*j*) Story on Bailments, 5th ed. 523, n.

(*k*) The American law is the same. Cf. Angell on Carriers, sect. 80, 3rd edit.; Edwards v. Sherratt,

1 East, 604; *Oakley v. Portsmouth, &c. Company*, 25 L. J. 99, Exch.; *Davis v. Garrett*, 6 Bing. 716.

(*l*) 1 Vent. 190, 238.

(*m*) 1 T. R. 18.

carriers by land, have been chiefly cases where the loss or damage has been caused by robbery or fire, it may now be considered briefly how far those cases apply to the law of inland carriers by water; and it appears to be clear that the exemptions, which they establish, are confined strictly to carriers *by sea*, as distinguished from inland carriers by water.

The 7 Geo. 2, c. 15, s. 1, enacts, that no owner of “any *ship or vessel*” shall be liable, beyond the amount of the value of the ship and freight, for the loss of “gold, silver, diamonds, jewels, precious stones, or other goods or merchandise, by reason of any embezzlement, secreting, or making away with by the master or mariner.” *Sutton v. Mitchell* (*n*) was a case under this section; and there it was held to exonerate the owner of a ship lying in the Thames, and bound from London for Hamburg, from liability for a robbery to which one of the crew was accessory. This case was decided on the special language of the statute; and the common law liability of the owner of the ship does not appear to have been either questioned or doubted. It will be observed that the ship was engaged in foreign commerce, and that the owner was clearly a carrier by sea.

By the 26 Geo. 3, c. 86, s. 2, it is similarly enacted, that “no owner of any *ship or vessel*” shall be liable for loss or damage of freighted goods by reason of any *fire* on board the vessel. The preamble of the act states its object to be “to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others.” This section was considered fully in the House of Lords in *Hunter v. M’Gown* (*o*); and it was held, that the act was confined generally to carriage by sea; that a gabbert, or lighter, plying between Glasgow and the ports in the Clyde was not a “*ship or vessel*” within the statute; and that, therefore, the owner of the gabbert was liable for a loss by fire on board the gabbert. The Lord Chancellor said: “I have no hesitation in saying

(*n*) 1 T. R. 18.

(*o*) 1 Bligh, 573.

that I am of opinion that the act of the 26 Geo. 3, c. 86, relates only to ships and vessels usually occupied in sea voyages; and that it is not an act which gives protection in case of small craft, lighters, and boats, and so on, concerned in inland navigation" (*p*).

The decision of the court in this case, as was suggested during the argument, although the suggestion does not appear to have been expressly adopted by the court, seems to be in conformity with the express language of the 53 Geo. 3, c. 159, s. 5, which was passed to amend the 7 Geo. 2, c. 15, and 26 Geo. 3, c. 86 (*q*). That act confirms and extends the privileges and immunities given by the earlier acts to the owners of "*ships or vessels*;" but the 5th section enacts, that nothing in the act "shall extend or be construed to extend to the owner or owners of any lighter, barge, boat, or vessel of any burthen or description whatsoever, used *solely* in rivers or inland navigation, or any ship or vessel not duly registered by law." There can be little doubt, therefore, that the 7 Geo. 2, c. 15, like the 26 Geo. 3, c. 86, must be held to apply strictly to ships or vessels employed, either solely, or usually, in carrying by sea; and not to ships or vessels employed solely, or usually, in inland navigation. It must be admitted, however, that some debateable questions of liability might arise where a ship or vessel is engaged partly in inland carriage by water, and partly in coasting navigation, or carriage beyond seas. It appears, however, that the carrier in such a case may well be a common carrier according to the law of the United States, where it is assumed, that the law of England is also to this effect (*r*). There appears to be no distinction between the liabilities of large and small craft engaged in inland navigation: and it is therefore unnecessary to consider what is the dividing line between a ship, or vessel, and a boat. But it has been held, under the 8

(*p*) Cf. *Morewood v. Pollock*, 1 E. & B. 743; 22 L. J. 251, Q. B.

(*q*) *Wilson v. Dickson*, 2 B. & Ald. 2.

(*r*) Angell, sect. 88, 3rd edit.

& 9 Vict. c. 88, s. 13, that no vessel under fifteen tons is a ship; and it appears clear that a small river boat, such as will hold only one or two persons, is neither a ship nor a vessel in the language of the law (s).

It may, therefore, be taken as manifest law that the common law duties and liabilities of inland carriers by water are not affected by the above statutes, nor by any of the recent Shipping Acts. Their duties and liabilities are regulated, in the first instance, by the ordinary common law duties of carriers; and, in the second place, by statutes which are about to be noticed. Generally, the same questions of express and implied contracts arise in water carriage as in land carriage, and are decided by the same principles. Thus, in *Lyon v. Mells* (t), it was held, that every carrier by water impliedly promises that his vessel is waterproof and seaworthy (u). So, in *Walker v. Jackson* (x), the defendants were sued as proprietors of a ferry for damage to goods which they had contracted to carry across, and land safely. The damage was caused while the goods were in the custody of the servants of the defendants, and apparently by their negligence, after the goods had been unshipped, and while they were being hauled up on the land. It was held a question for the jury on the evidence, whether the goods had been *landed* within the terms either of an express contract or of a contract implied by usage; and also that *landing* goods did not necessarily form any part of a contract to ferry them across (y). It was held also, that the plaintiff could not be affected by constructive knowledge of a public notice of limited liability which there was no evidence that he had seen.

On this second point it is to be noticed, as the principal distinction between the liabilities of carriers by land and

(s) *Benyon v. Cresswell*, 12 Q. B. L. J. 240, Q. B. 899.

(x) 10 M. & W. 161.

(t) 5 East, 428.

(y) *Bourne v. Gatcliffe*, 1 Scott,

(u) Cf. *Thompson v. Hopper*, 25 N. R. 1.

of inland carriers by water, that the Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68, does not apply to carriers by water; and, therefore, until recently, customers might be fixed with actual or constructive knowledge of a public notice, as evidence of a special contract in the terms of the notice, in the same way as carriers by land might be similarly affected with such a notice before the act. But it is clear that, since the Railway and Canal Traffic Act, 1854 (z), no such special contract can be implied in the case of a *canal* company against a customer; but that the contract must be in writing, and *signed* by the customer, or his agent. It is apparent, however, that the statute has, in this case, produced the strange anomaly of prohibiting such implied special contracts in the case of *canal companies*, or navigation companies on whom tolls are levied (see the preamble of the act); but of allowing them to be made, or implied as before the statute, and as before the Carriers Act, in the case of *river* companies, on whom tolls are not levied, or which are not incorporated or conducted under act of parliament (see preamble 17 & 18 Vict. c. 31); and of all other inland carriers by water except canal companies. It appears, therefore, that all such carriers can still, as before the Railway and Canal Traffic Act, exempt themselves, by express written or oral contracts, from liability for gross negligence; or by affecting a customer with express or implied knowledge of a public notice; and that there is no necessity that a special contract with such carriers should be signed by the customer in order to be good against him.

On the other hand, the carrier by water, whether by canal or river, remains liable as at common law for valuable goods, and cannot plead the non-disclosure of value under the Carriers Act, nor a limited liability under any of the various Mercantile Shipping Acts; and a public notice of limited liability will be unavailing unless he can show that

(z) See Chapter XIII., *supra*, p. 260.

the customer knew its terms when he entered into the contract of carriage.

Such, it is apprehended, are the principles by which the ordinary duties and liabilities of inland carriers apply to dealings between inland carriers by water and their customers; and as this treatise is confined to this relation, it is not proposed to lengthen it by considering the questions of tolls, rules of rivers, cases of collision, &c., which do not arise strictly between carriers, as such, and their customers. But as the legislature has thought it fit to make the traffic of canal companies the subject of special enactments, these will form aptly the last subject of consideration.

Under these acts, canal companies are liable for all damage or loss which the public may sustain from the negligence of the companies in the exercise of their statutable powers; but not for damage which does not result proximately from their negligence, or from that of their agents (*a*). It may also be remarked, that, where other carriers or the public have the right of navigation or transit on a canal, they are entitled to avail themselves of scientific discoveries, such as steam, in the propelling of boats, which have been made since the undertaking was projected; provided that the exercise of such a right does not interfere with the vested rights of the proprietors of the canal, or other navigation (*b*).

3 & 4 *Vict. c. 50.*

An act to provide for keeping the peace on canals and navigable rivers.

This act enables two justices of the peace, on the application of a committee or board of proprietors of any canal or navigable river, to appoint constables to keep the peace on the line of navigation, and within a quarter of a mile

(*a*) *Whitehouse v. Birmingham Canal Company*, 27 L. J. 25, Exch.;
Manley v. St. Helen's Canal Company, 27 L. J. 159, Exch.; *Cowley*

v. Mayor of Sunderland, 30 L. J. 127, Exch.

(*b*) *Case v. Midland Counties Railway*, 28 L. J. 727, Chan.

from the banks, and to apprehend for felony, or on suspicion of felony and other offences, like ordinary constables. Sect. 8 imposes penalties on persons feloniously or unlawfully injuring goods in the custody of the company on the banks.

8 & 9 *Vict. c. 28.*

An act to empower canal companies and the Commissioners of Navigable Rivers to vary their tolls, rates, and charges on different parts of their navigation.

This act empowers companies to vary their tolls and charges, according to local circumstances in different parts of their line of traffic; but so that the tolls shall be charged to all people equally under like circumstances.

8 & 9 *Vict. c. 42.*

An act to enable canal companies to become carriers of goods upon their canals.

This is the principal act by which inland water carriage is regulated; and the earlier sections will therefore be stated here at length. The rest will be given in the Appendix (c).

“Whereas by divers acts of parliament railway companies have been empowered to convey upon their railways all such goods, wares, merehandize, articles, matters and things as may be offered to them for that purpose, and to make such reasonable charges for such conveyance as they may from time to time determine upon: and whereas greater competition for the public advantage would be obtained if similar powers were granted to canal and navigation companies which have from time to time been incorporated or established under the authority of parliament: but such beneficial purpose cannot be effected without the authority of parliament: be it therefore enacted:—That from and after the passing of this act it shall be lawful for the company of proprietors, trustees, or the undertakers of any canal, river, or navigation, or their respective committees, directors, or managers, or their superintendents or other agents by them duly authorized, to carry as common carriers for their own profit upon their respective canals, rivers, or navigation, or upon any railways or tramways belonging thereto and constructed under the powers of their respective acts of parliament, or upon any other canals, rivers, or navigation communicating therewith, either directly or by means of any intermediate canal,

(c) *Infra*, p. 351.

river, or navigation, all such goods, wares, merchandize, articles, matters, and things as may be intrusted to them for that purpose; and for the better enabling them so to do, to purchase, hire, and construct, and to use and employ any number of boats, barges, vessels, rafts, carts, waggons, carriages, and other conveniences; and also to establish and furnish such haulage, trackage, or other means of drawing or propelling the same, either by steam, animal, or other power, or for the purpose of collecting, carrying, conveying, warehousing, and delivering such goods, wares, merchandize, articles, matters, and things as to any such company or undertakers shall seem fit; and to make such reasonable charges for such conveyance, warehousing, collecting, and delivery as they may respectively from time to time determine upon, in addition to the several tolls or dues which any such company or undertakers are now authorized to take for the use of the said canals, navigations, or railways."

Sect. 2. "Any such company, commissioners, trustees, or undertakers using or employing any steam power for propelling by means of paddle-wheels, boats, barges, vessels, or rafts, upon any canal, river, or navigation (other than their respective canals, rivers, and navigations), shall use and employ the same subject to such bye-laws, rules, and regulations touching the construction, dimensions, power, rate of speed, and otherwise, of such boats, barges, vessels, or rafts so propelled by steam as aforesaid, as the directors, commissioners, or undertakers of the canals, rivers, and navigations respectively, on which such last-mentioned boats, barges, vessels, or rafts shall be used and employed shall see fit to make and publish in that behalf; and they are hereby authorized and empowered to make and publish such bye-laws, rules, and regulations, and from time to time to add to or amend the same as need may require; but it is hereby expressly provided and enacted that any bye-laws, rules, and regulations so to be made and published, shall be made equally applicable to and binding on all companies and persons so using such last-mentioned boats, barges, or other vessels."

On the general effect of such bye-laws see Chapter XII.

Sect. 3. "It shall also be lawful for any such company, trustees, or undertakers to purchase and provide and use boats and other vessels, and also horses, steam, or other power, and machinery for hauling, tracking, and towing upon their own canals, rivers, or navigations, or upon any other canals, rivers, or navigations communicating therewith, either directly or by means of any intermediate canal, river, or navigation, and to employ a sufficient number of competent persons for those purposes, and to demand and receive for the use of such boats,

and for such hauling, tracking, or towing, such reasonable hire or remuneration as shall be fixed by the respective committees, directors, or managers of such canals or navigations, or as shall be agreed upon between them and any person desiring the use of any such boats or vessels, or requiring such hauling, tracking, or towing."

Sect. 4. "All charges to be made by any such companies for the carriage of any such goods, wares, merchandize, articles, or things, or for the use of their boats and other vessels, or for the supply of haulage, trackage, or other power, shall be at all times charged equally to all persons, and after the same rate, whether per mile, or per ton per mile, or otherwise, in respect of all goods, wares, merchandize, articles, or things of a like description, and conveyed or propelled in a like boat or vessel, at the same rate of speed, and passing along the same portion of any such canal or navigation, under the like circumstances, and no reduction or advance in any of such charges shall be made, either directly or indirectly, in favour of or against any particular company or person passing along or using, or sending goods, wares, merchandize, articles, or things, along the same portion of any such canal or navigation under the like circumstances."

Sect. 5. "Any canal or navigation company, exercising the powers by this act granted, shall have all the same powers and remedies for recovering any sum or sums of money which shall or may become due and owing to such company as carriers, or for the use of any boats or vessels, or for the supply of any haulage, trackage, or other power, by virtue of this act, as are given to them respectively by their said several acts of parliament, in reference to the tolls and duties thereby made payable; or they may at their option sue for and recover such charges or any part thereof in any of the superior courts; and such company may in like manner be sued for any loss sustained by any person or persons employing the said company as carriers, or for any neglect or misconduct of such company or their servants, in respect of their conduct as carriers, by virtue of this act, and such company may prosecute any indictment or other proceeding at law, in respect of any offence arising or being committed in the course of such carrying or other proceeding under this act; and it shall be sufficient if any goods or other things which are set out in any indictment, shall be described and laid to be the property of the said company."

Sect. 6. "Nothing herein contained shall in any case extend to charge or make liable any such company further or in any other case than where, according to the laws of this realm, for the time being, common carriers would be liable; nor shall anything herein contained extend to deprive such company of any protection or privilege which either now or at any time hereafter common carriers have or may be entitled to, but such company shall from time to time and at all times

have and be entitled to the benefit of every such protection and privilege."

Sect. 7. "And whereas, in order to facilitate the conveyance of goods and merchandize and other matters and things in manner aforesaid, it is expedient that canal and navigation companies should be empowered to enter into arrangements with each other, in the way that railway companies are authorized, so as to avoid the necessity for a change of boats, and other delays arising from a diversity of interest; be it enacted, that, notwithstanding anything in this act, or in any of the said acts for establishing or incorporating the said companies contained, it shall be lawful for any such canal or navigation company as aforesaid, and they are hereby empowered, from time to time, to make and enter into any contract or agreement with any other canal or navigation company, or the commissioners or undertakers thereof respectively (and which contract or agreement such other company is hereby authorized to enter into), either for the division or appointment of tolls, dues, charges, or for the passage over or along their respective canals or navigations, or any branches thereof, or any railways or tramways connected therewith and belonging thereto as aforesaid, of any boats, barges, or other vessels, or of any carriages, or trucks, drawn or propelled by steam, animal, or other power, of or belonging to any other company, or which shall pass along any other line of canal navigation, or railway, upon the payment of such tolls and duties, and under such conditions and restrictions as may be deemed advisable, and may be mutually agreed upon; and also to enter into any other contract with any other canal or navigation company that may be deemed advisable; and any such contract may contain such covenants, clauses, conditions, and agreements as the contracting parties may think advisable and mutually agree upon."

It will be observed (sect. 1) that this act applies only to canal and navigation companies which have been incorporated or established under the authority of parliament; and in this respect its language is substantially co-extensive with that of the preamble of the Railway and Canal Traffic Act, 1854. None of these acts affect unincorporated companies, or companies which are not established under the authority of parliament; nor do they affect ordinary partnerships or individual carriers by water. This act has been amended by 10 & 11 Vict. c. 94, for the purpose of enabling canal companies or carriers to borrow money on mortgage or bond.

By 21 & 22 Vict. c. 75, s. 3, (made perpetual by 23 & 24 Vict. c. 41,) nothing in the 8 & 9 Vict. c. 42, is to make it lawful for any canal or navigation company, being also a railway company, or entitled to work a railway under any act of parliament, "to accept a lease of the whole or any part of the undertakings of any other railway and canal company, or of any canal or navigation company, or of the tolls, dues, or charges, upon or in respect of the whole or any part of any such undertaking," except under the powers of some existing or future act in which the power shall be specifically given.

17 & 18 VICT. c. 31.

(Railway and Canal Traffic Act, 1854.)

As this statute was considered fully, in the preceding chapters on railway carriers, it is sufficient to refer to it here. The preamble states that the word "'canal' shall include any navigation whereon tolls are levied by authority of parliament; and also the wharves and landing places of and belonging to such canal or navigation, and used for the purposes of public traffic."

"The expression 'canal company' shall include any person being the owner or lessee of, or any contractor working . . . any canal or navigation constructed or carried on under the powers of any act of parliament."

This treatise on the law of inland carriers ends with the present chapter on carriers by water. It is believed that no topic within its scope, and hardly any case of practical importance, have been unnoticed during its progress; and it has been earnestly endeavoured to avoid such omissions.

Some subjects, such as the doctrine of general average and contribution, have been passed over intentionally, both because they are not of frequent occurrence, and because they belong more appropriately, and probably exclusively, to the law of carriers by sea.

APPENDIX.

CARRIERS ACT.

1 WILL. 4, c. 68.

An Act for the more effectual Protection of Mail Contractors, Stage-Coach Proprietors, and other Common Carriers for Hire, against the Loss of or Injury to Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which shall not be declared to them by the Owners thereof.

[23rd July, 1830.]

WHEREAS by reason of the frequent practice of bankers and others of sending by the public mails, stage-coaches, waggons, vans, and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire is greatly increased : And whereas through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage-coach proprietors, and other common carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, stage-coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses : Be it therefore enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act no mail contractor, stage-coach proprietor, or other common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property of the descriptions

Mail contractors, coach proprietors and carriers not to be liable for loss of certain goods above the value of 10*l.*, un-

less delivered as such, and increased charge accepted.

following, (that is to say,) gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain, or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail, or stage-coach, or other public conveyance, when the value of such article or articles, or property aforesaid, contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles, or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

When any parcel shall be so delivered an increased rate of charge may be demanded.

II. And be it further enacted, that when any parcel or package, containing any of the articles above specified, shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such mail contractors, stage-coach proprietors, and other common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge.

Notice of the same to be affixed in offices or warehouses.

Carriers to give receipts, acknowledging increased rate.

III. Provided always, and be it further enacted, that when the value shall have been so declared, and the increased rate of charge

paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge or accepting such agreement shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage-coach proprietor, or other common carrier as aforesaid, shall not have or be entitled to any benefit or advantage under this act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge.

In case of neglect to give receipt or affix notice, the party not to be entitled to benefit of this act.

IV. Provided always, and be it enacted, that from and after the first day of September now next ensuing no public notice or declaration heretofore made or hereafter to be made shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail contractors, stage-coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them; but that all and every such mail contractors, stage-coach proprietors, and other common carriers as aforesaid, shall, from and after the said first day of September, be liable, as at the common law, to answer for the loss or any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding.

Publication of notices not to limit the liability of proprietors, &c. in respect of any other goods conveyed.

V. And be it further enacted, that for the purposes of this act every office, warehouse, or receiving house which shall be used or appointed by any mail contractor or stage-coach proprietor, or other such common carrier as aforesaid, for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving house, warehouse, or office of such mail contractor, stage-coach proprietor, or other common carrier; and that any one or more of such mail contractors, stage-coach proprietors, or common carrier shall be liable to be sued by his, her, or their name or names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person shall abate for the want of joining any co-proprietor or co-partner in such mail, stage coach, or other public conveyance by land for hire as aforesaid.

Every office used to be deemed a receiving house;

and any one coach proprietor or carrier shall be liable to be sued.

VI. Provided always, and be it further enacted, that nothing in this act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage-coach proprietor, or common carrier, and any other parties, for the conveyance of goods and merchandizes.

Not to affect contracts.

Parties entitled to damages for loss may also recover back extra charges.

VII. Provided also, and be it further enacted, that where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled to recover back such increased charges so paid as aforesaid, in addition to the value of such parcel or package.

Nothing herein to protect felonious acts.

VIII. Provided also, and be it further enacted, that nothing in this act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct.

Coach proprietors and carriers liable only to such damages as are proved.

IX. Provided also, and be it further enacted, that such mail contractors, stage-coach proprietors, or other common carriers for hire shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid, but that he or they shall in all cases be entitled to require, from the party suing in respect of any loss or injury, proof of the actual value of the contents by the ordinary legal evidence, and that the mail contractors, stage-coach proprietors, or other common carriers as aforesaid shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges as before mentioned.

Money may be paid into court in all actions for loss of goods.

X. And be it further enacted, that in all actions to be brought against any such mail contractor, stage-coach proprietor, or other common carrier as aforesaid, for the loss of or injury to any goods delivered to be carried, whether the value of such goods shall have been declared or not, it shall be lawful for the defendant or defendants to pay money into court in the same manner and with the same effect as money may be paid into court in any other action.

Public act.

XI. And be it further enacted, that this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded.

RAILWAY AND CANAL TRAFFIC ACT.

17 & 18 VICT. c. 31.

An Act for the better regulation of the Traffic on Railways and Canals.

[10th July, 1854.]

“WHEREAS it is expedient to make better provision for regulating the traffic on railways and canals :” be enacted as follows :—

I. In the construction of this act “the board of trade” shall mean the lords of the committee of her Majesty’s privy council for trade and foreign plantations :

“Board of trade.”

The word “traffic” shall include not only passengers, and their luggage, and goods, animals and other things conveyed by any railway company or canal company, or railway and canal company, but also carriages, waggons, trucks, boats and vehicles of every description adapted for running or passing on the railway or canal of any such company :

“Traffic.”

The word “railway” shall include every station of or belonging to such railway used for the purposes of public traffic : and,

“Railway.”

The word “canal” shall include any navigation whereon tolls are levied by authority of parliament, and also the wharves and landing places of and belonging to such canal or navigation, and used for the purposes of public traffic :

“Canal.”

The expression “railway company,” “canal company,” or “railway and canal company,” shall include any person being the owner or lessee of or any contractor working any railway or canal or navigation constructed or carried on under the powers of any act of parliament :

“Company.”

A station, terminus, or wharf shall be deemed to be near another station, terminus, or wharf, when the distance between such stations, termini or wharves shall not exceed one mile, such stations not being situate within five miles from St. Paul’s church in London.

Stations.

II. Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect

Duty of railway companies to make arrangements for receiving and forwarding traffic, without unreasonable delay, and without partiality.

whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf.

Parties complaining that reasonable facilities for forwarding traffic, &c. are withheld may apply by motion or summons to the superior courts.

III. It shall be lawful for any company or person complaining against any such companies or company of anything done, or of any omission made in violation or contravention of this act, to apply in a summary way, by motion or summons, in England, to her Majesty's Court of Common Pleas at Westminster, or in Ireland to any of her Majesty's superior courts in Dublin, or in Scotland to the Court of Session in Scotland, as the case may be, or to any judge of any such court; and, upon the certificate to her Majesty's attorney-general in England or Ireland, or her Majesty's lord advocate in Scotland, of the board of trade, alleging any such violation or contravention of this act by any such companies or company, it shall also be lawful for the said attorney-general or lord advocate to apply in like manner to any such court or judge, and in either of such cases it shall be lawful for such court or judge to hear and determine the matter of such complaint; and for that purpose, if such court or judge shall think fit, to direct and prosecute, in such mode and by such engineers, barristers, or other persons as they shall think proper, all such inquiries as may be deemed necessary to enable such court or judge to form a just judgment on the matter of such complaint; and if it be made to appear to such court or judge on such hearing, or on the report of any such person, that anything has been done or omission made, in violation or contravention of this act, by such company or companies, it shall be lawful for such court or judge to issue a writ of injunction or interdict, restraining such company or companies from further continuing such violation or contravention of this act, and enjoining obedience

to the same ; and in case of disobedience of any such writ of injunction or interdict it shall be lawful for such court or judge to order that a writ or writs of attachment, or any other process of such court incident or applicable to writs of injunction or interdict, shall issue against any one or more of the directors of any company, or against any owner, le-see, contractor, or other person failing to obey such writ of injunction or interdict ; and such court or judge may also, if they or he shall think fit, make an order directing the payment by any one or more of such companies of such sum of money as such court or judge shall determine, not exceeding for each company the sum of two hundred pounds for every day, after a day to be named in the order, that such company or companies shall fail to obey such injunction or interdict ; and such moneys shall be payable as the court or judge may direct, either to the party complaining, or into court to abide the ultimate decision of the court, or to her Majesty, and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by decree or judgment in any superior court at Westminster or Dublin, in England or Ireland, and in Scotland by such diligence as is competent on an extracted decree of the court of session ; and, in any such proceeding as aforesaid, such court or judge may order and determine that all or any costs thereof or thereon incurred shall and may be paid by or to the one party or the other, as such court or judge shall think fit ; and it shall be lawful for any such engineer, barrister, or other person, if directed so to do by such court or judge, to receive evidence on oath relating to the matter of any such inquiry, and to administer such oath.

IV. It shall be lawful for the said Court of Common Pleas at Westminster, or any three of the judges thereof, of whom the chief justice shall be one, and it shall be lawful for the said courts in Dublin, or any nine of the judges thereof, of whom the lord chancellor, the master of the rolls, the lords chief justice of the Queen's Bench and Common Pleas, and the lord chief baron of the Exchequer, shall be five, from time to time to make all such general rules and orders as to the forms of proceedings and process, and all other matters and things touching the practice and otherwise in carrying this act into execution before such courts and judges, as they may think fit, in England or Ireland, and in Scotland it shall be lawful for the Court of Session to make such acts of sederunt for the like purpose as they shall think fit.

V. Upon the application of any party aggrieved by the order made upon any such motion or summons as aforesaid, it shall be

Judges may make such regulations as may be necessary for proceedings under this act.

Court or judge may order a rehearing.

lawful for the court or judge by whom such order was made to direct, if they think fit so to do, such motion or application on summons to be reheard before such court or judge, and upon such rehearing to rescind or vary such order.

Mode of proceeding under this act.

VI. No proceeding shall be taken for any violation or contravention of the above enactments, except in the manner herein provided; but nothing herein contained shall take away or diminish any rights, remedies or privileges of any person or company against any railway or canal or railway and canal company under the existing law.

Company to be liable for neglect or default in the carriage of goods, notwithstanding notice to the contrary.

VII. Every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle or other animals, or to any articles, goods or things, in the receiving, forwarding or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition or declaration, being hereby declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding and delivering of any of the said animals, articles, goods or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable: Provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereinafter mentioned: (that is to say,) for any horse fifty pounds; for any neat cattle, per head, fifteen pounds; for any sheep or pigs, per head, two pounds; unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned, a reasonable per centage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such per centage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. 4 & 1 Will. 4, cap. 68, and shall be binding upon such company in the manner therein mentioned: Provided also, that the proof of the value of such animals, articles, goods and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury: Provided also, that no special contract, between such company and any other parties respecting the receiving, forwarding

Company not to be liable beyond a limited amount in certain cases, unless the value declared and extra payment made.

Proof of value to be on the person claiming compensation.

No special contract to be binding unless signed.

or delivering of any animals, articles, goods or things as aforesaid, shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods or things respectively for carriage: provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said act of 11 Geo. 4 & 1 Will. 4, c. 68, with respect to articles of the descriptions mentioned in the said act.

Saving of Carriers
Act, 11 Geo. 4 &
1 Will. 4, c. 68.

VIII. This act may be cited for all purposes as “The Railway and Canal Traffic Act, 1854.” Short title.



REGULÆ GENERALES, 1855.

IN THE COMMON PLEAS AT WESTMINSTER.

As to the Forms of Proceedings and Process, made pursuant to the Statute 17 & 18 Victoria, chapter 31, section 4, intituled “An Act for the better Regulation of the Traffic on Railways and Canals.”

1. Every application made under this act to the court shall be for a rule calling upon the company or companies complained of, to show cause why a writ of injunction should not issue against such company or companies, enjoining them to do, or to desist from doing, the thing required to be done, or the thing the doing of which is complained of by the company or person making such application, and every application made under this act to a judge at chambers shall be by summons, calling upon the company or companies complained of to show cause in like manner, which summons shall be granted only upon affidavit, and upon a statement made to the judge in like manner as upon an application to the court for a rule to show cause.

2. If, on the hearing of any such rule or summons, the court or judge shall think fit to direct and prosecute inquiries into the matter thereof, under the third section of this act, the order for that purpose shall be in the following terms, or to the like effect; the rule or summons being enlarged until such further day as the court or judge shall think fit, in order that in the mean time such inquiries may be made and reported on:

“In the Common Pleas.

“In the matter of the complaint of *A. B.* [or of the company] against the company.—It is ordered, that *C. D.*, esquire,

engineer [*or as the case may be*], do forthwith make such inquiries into the matter of this complaint as may be necessary to enable the court [*or the Honourable Mr. Justice*] to determine the same, and do report thereon to the court [*or to the said Mr. Justice*] on or before the day of next.

“Dated this day of 185 .”

3. Office copies of all the affidavits filed by either party on the hearing of such rule or summons shall, at the expense of such party, be furnished to the person appointed to make such inquiries, within three days after the making of such order as aforesaid.

4. The parties shall be entitled to be again heard by the court or judge upon the said report; but no fresh affidavits shall be allowed on such hearing, unless by leave of the court or a judge.

5. Every writ of injunction issued under this act shall be in the following form, or to the like effect:

“Victoria, &c. To the company, their agents and servants, and every of them, greeting. Whereas, *A. B.* [*or ‘the company’*] hath lately complained before us in our Court of Common Pleas at Westminster, of a violation and contravention by you the said Company of ‘The Railway and Canal Traffic Act, 1854;’ that is to say, in [*state the act or omission complained of*]; and whereas upon the hearing of such complaint the same hath been found to be true: We do, therefore, strictly enjoin and command you the said company and your agents and servants, and every one of you, that you, and every one of you, do from henceforth altogether absolutely desist from [*state the matter for the injunction where an act done is complained of*] [*or ‘that you and every one of you forthwith do’ (state the matter for the injunction where an omission is complained of)*] until our said court shall make order to the contrary. Witness, Sir John Jervis, Knight, at Westminster, the day of in the year of our Lord .”

6. If the court or judge shall think fit also to make an order, directing the payment of a sum of money by the company or companies complained of, such order shall be in the following form, or to the like effect:

“In the Common Pleas.

“In the matter of the complaint of against the company.—It is ordered, that the said company do pay to the said , [*or ‘into court, to abide the ultimate decision of the court in the matter of the said complaint,’ or ‘to the use of Her Majesty,’*] the sum of £ for every day after the day of instant, that the said company shall fail to obtain a certain

writ of injunction dated this day, and issued against the said company at the instance of the said .

“Dated this day of 1855 .”

7. If such money be ordered to be paid into court, to abide the ultimate decision of the court, the same shall, upon the ultimate decision of the court being made, be paid out of court either to the party complaining, or to the use of Her Majesty, or to the company by which the same was paid into court, as the court or judge shall direct.

JOHN JERVIS.

W. H. MAULE.

C. CRESSWELL.

E. V. WILLIAMS.

R. B. CROWDER.

January 31, 1855.

CANAL AND RIVER CONSTABLES ACT.

3 & 4 VICT. c. 50.

An Act to provide for keeping the Peace on Canals and Navigable Rivers. [4th August, 1840.]

WHEREAS robberies and other outrages are frequently committed on canals and navigable rivers throughout England and Wales, and it is expedient that power be given to appoint constables for better keeping the peace, and for the prevention and detection of crime, along the line of such canals and rivers, and in the neighbourhood thereof: be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that it shall be lawful for any two justices of the peace, and for the watch committee of any incorporated borough, within their several jurisdictions, on the application of the committee or board of directors acting in the management of the affairs of the company of proprietors of any canal or navigable river, or of any clerk or agent of any such company, duly authorized by such committee or board of directors, to appoint so many persons as they shall think fit from among those who shall be recommended to them for that purpose by such company of proprietors, clerk or agent, to act as constables on and along such canal or river; and every person so appointed shall take an oath or

Appointment of constables for canals and rivers;

who shall take the following oath.

make a solemn declaration in the form or to the effect following, (that is to say,)

Oath of constables.

“I, *A. B.*, having been appointed a constable to act upon and along the [*name the canal or navigable river*], under the provisions of [*here insert the title of this act*], do swear, that I will well and truly serve our sovereign lady the Queen in the said office of constable, without favour or affection, malice or ill-will; and that I will, to the best of my power, cause the peace to be kept, and prevent all offences against the peace; and that, while I continue to hold the said office, I will, to the best of my skill and knowledge, discharge the duties thereof faithfully according to law.

“So help me God.”

Powers of constables.

Such oath or declaration to be administered by any one such justice; and every person so appointed, and having taken such oath or made such declaration as aforesaid, shall have full power to act as constable for the preservation of the peace, and for the security of persons and property against felonies and other unlawful acts, on such canal or river, and the towing paths and works belonging thereto, and on and within any railways, tramroads, wharfs, quays, locks, docks, landing places, warehouses, lands and premises belonging to any such company, and in all places not more than one quarter of a mile distant from either bank of such canal or river, or from such railways, and shall have all such powers, protections and privileges for the apprehending of offenders, as well by night as by day, and for doing all things for the prevention, discovery and prosecution of felonies and other offences, and for keeping the peace, which any constable duly appointed has within his constablewick: provided always, that such power shall not extend to authorize any such person to act as such constable within the metropolitan police district, or the city of London and the liberties thereof, or in any places beyond the banks, towing paths and other the premises belonging to such company, as may be situate within any other city or any incorporated borough, anything in this act contained to the contrary notwithstanding.

Dismissal of constables.

II. And be it enacted, that it shall be lawful for any two justices, or the watch committee of any incorporated borough, to dismiss any such constable who shall act within their several jurisdictions, or for the company of proprietors of any such canal or river for which any such constables shall be appointed, or for any clerk or agent of such company duly authorized by the committee or board of directors of such companies, to dismiss any such constable from his office of constable; and upon every such dismissal all powers, protections and privileges belonging to any such person by reason

of such appointment shall wholly cease; and no person so dismissed shall be capable of being again appointed or acting as a constable for the same canal or river, without the consent of the authority by which he was dismissed.

III. And be it enacted, that it shall be lawful for every such company of proprietors to pay to every such constable, out of the monies and effects of the company, such salary or allowances, and at such times and in such manner, as the company shall think fit.

Constables how paid.

IV. And be it enacted, that every constable who shall be guilty of any neglect or breach of duty in his office of constable shall be liable to a penalty not more than ten pounds, the amount of which penalty may be deducted from any salary due to such offender, or, in the discretion of the magistrate before whom such offender shall have been convicted, such offender may be imprisoned in the gaol or house of correction for the county or place in which such offence shall have been committed, with or without hard labour, for any time not more than one calendar month.

Penalty on constables for neglect of duty.

V. And be it enacted, that every constable who shall be dismissed from or shall cease to hold his office, and who shall not forthwith deliver over all the clothing, accoutrements, appointments, and all other necessities which have been supplied to him for the execution of his duty, to such person and at such time and place as shall be directed by the company on whose recommendation he shall have been appointed, or by any clerk or agent of such company duly authorized by the company to receive the same, shall be liable to be imprisoned in any gaol or house of correction as aforesaid, with or without hard labour, for any time not exceeding one calendar month; and it shall be lawful for any justice of the peace to issue his warrant to search for and seize, to the use of such company, all the clothing, accoutrements, appointments, and other necessities which shall not be so delivered over, wherever the same may be found.

Constables dismissed to deliver up accoutrements.

VI. And be it enacted, that every person who shall assault or resist any constable appointed as aforesaid in the execution of his duty, or who shall aid or incite any person so to assault or resist, shall for every such offence be liable to a penalty not more than ten pounds, or, in the discretion of the magistrate before whom he shall be convicted, may be imprisoned in any gaol or house of correction as aforesaid, with or without hard labour, for any time not more than two calendar months.

Penalty for assault on constables.

VII. And be it enacted, that every person who shall be found upon any such canal or river, or in or upon any lock, dock, warehouse, wharf, quay, or bank thereof, or on board of any boat or vessel lying or being in any such canal or river, or in any lock or

Possessing instruments for unlawfully procuring and carrying away liquors.

dock thereunto belonging, having in his possession or under his control any tube or other instrument for the purpose of unlawfully obtaining any wine, spirits or other liquors or goods, or having in his possession any skin, bladder, or other utensil for the purpose of unlawfully secreting or carrying away any such wine, spirits, or other liquors or goods, and any person who shall attempt unlawfully to obtain any such wine, spirit or other liquors or goods, shall for every such offence be liable to a penalty not more than five pounds, or, in the discretion of the magistrate before whom he shall be convicted, may be imprisoned as aforesaid, with or without hard labour, for any time not more than one calendar month.

Unlawfully injuring the contents of packages.

VIII. And be it enacted, that every person who shall bore, pierce, break, cut open, or otherwise injure any cask, box, or package, containing wine, spirits, or other liquors, or any case, box, sack, wrapper, package, or roll of goods, on board of any boat, vessel, or waggon, or in or upon any warehouse, wharf, quay, or bank of or belonging to any such canal or river, with intent feloniously to steal or otherwise unlawfully obtain or to injure the contents or any part thereof, or who shall unlawfully drink or wilfully spill or allow to run to waste any such liquors or any part thereof, shall for every such offence be liable to a penalty not more than five pounds, over and above the value of the goods or liquors so taken or destroyed, or, in the discretion of the magistrate before whom he shall be convicted, may be imprisoned as aforesaid, with or without hard labour, for any time not more than one calendar month.

Constable, &c. having just cause to suspect felony, may enter on board vessels, and take up suspected persons.

IX. And be it enacted, that it shall be lawful for every constable appointed as aforesaid, having just cause to suspect that any felony, or any other offence contrary to the provisions of this act, has been or is about to be committed in or on board of any boat or other vessel lying in any such canal or river, or any lock or dock thereunto belonging, to enter at all times, as well by night as by day, into and upon every such boat or other vessel, and therein to take all necessary measures for the prevention or detection of all felonies or other offences which he has just cause to suspect to have been or to be about to be committed, and to take into custody all persons suspected of being concerned in such felonies or other offences, and also to take charge of all property so suspected to be stolen or embezzled.

Constable may apprehend without warrant in certain cases.

X. And be it enacted, that it shall be lawful for any such constable to take into custody, without a warrant, any loose, idle, and disorderly person whom he shall find disturbing the public peace, or whom he shall have good cause to suspect of having committed or being about to commit any felony, misdemeanor, or breach of the peace, or other offence contrary to the provisions of this act, and

every person whom he shall find, between sunset and the hour of eight in the morning, lying or loitering in or upon any towing path, or in or upon any wharf, bridge, railway, quay, landing place, lock, dock, or upon the bank of any such canal or river, and not giving a satisfactory account of himself.

XI. And be it enacted, that any person found committing any offence punishable upon summary conviction by virtue of this act, may be taken into custody, without a warrant, by any constable, or may be apprehended by the owner of the property with respect to which the offence shall be committed, or by his servant, or any person authorized by him, and may be detained until he can be delivered into the custody of a constable to be dealt with according to law; and every such constable may also stop, search and detain any vessel, boat, cart, or carriage in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found, and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained.

Power to constables and persons aggrieved to apprehend certain offenders.

XII. And be it enacted, that any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed with respect to such property, or that the same or any part thereof has been stolen or unlawfully obtained, is hereby authorized, and if in his power is required, to apprehend and detain, and as soon as may be to deliver such offender into the custody of a constable, together with such property, to be dealt with according to law.

Stolen property offered in pawn may be detained.

XIII. Provided always, and be it enacted, that nothing herein contained shall be construed to prevent any person from being indicted for any indictable offence made punishable on summary conviction by this act, or to prevent any person from being liable under any other act or acts to any other higher penalty or punishment than is provided for such offence by this act, so nevertheless that no person be punished twice for the same offence.

Not to repeal local acts containing penalties.

XIV. And be it enacted, that any two justices of the peace within their several jurisdictions shall be empowered summarily to convict any person charged with any offence against this act, on the oath of one or more witnesses, or by confession of such person, and to award the penalty or punishment herein provided for such offence.

Offences how to be tried, and penalties how enforced.

XV. And be it enacted, that in every case of the adjudication of a pecuniary penalty under this act, and nonpayment thereof, it shall be lawful for the justices before whom any offender shall have been convicted to commit such offender to any gaol or house of correction within his jurisdiction for a term not more than one calendar month, where the sum to be paid shall not exceed five

If penalty is not paid the offender may be committed, or the penalty levied by distress.

5 Geo. 4, c. 18.

Form of conviction.

pounds, and in any case not more than two calendar months, the imprisonment to cease on payment of the penalty and the costs for the recovery thereof; or instead of imprisonment it shall be lawful for the justices, by warrant under their hands and seals, to order such penalty, with the reasonable costs and charges of the conviction, to be levied by distress and sale of the goods and chattels of the offender; and all such convictions and warrants shall be taken to be within the provisions of an act passed in the fifth year of the reign of King George the fourth, intituled "An Act for the more effectual Recovery of Penalties before Justices and Magistrates on Conviction of Offenders, and for facilitating the Execution of Warrants by Constables."

XVI. And be it enacted, that any justice of the peace before whom any person shall be summarily convicted for any offence against this act may cause the conviction to be drawn up, on paper or parchment, in the following form of words, or to the like effect; (that is to say,)

"County, city, or borough } Be it remembered, that on the
of to wit. } day of in the year of our Lord
in the county of } A. E. is convicted before us J. P. and
J. J. P., two of her Majesty's justices of the peace for the said
county, for that he the said A. E. did [*here specify the offence, and
the time and place when and where the same was committed, as the
case may be*]; and we do adjudge that the said A. E. shall for the
said offence forfeit the sum of and shall pay the same imme-
diately [*or shall pay the same on or before the day of*]
to C. D., to be by him applied according to the directions of the
statute in that case made and provided. Given under our hands
the day and year first above mentioned.

"J. P. and J. J. P."

Convictions not
to be quashed for
want of form.

XVII. And be it enacted, that no conviction for any offence against this act shall be quashed for want of form, or be removed by certiorari or otherwise into any of her Majesty's superior courts of record; and that no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that it is founded on a conviction, and there be a good and valid conviction to sustain the same; and that where any distress shall be made for levying any money by virtue of this act the distress itself shall not be deemed unlawful, nor the party making the same be deemed a trespasser, on account of any defect or want of form in the summons, conviction, warrant of distress, or other proceedings relating thereto, nor shall the party distraining be deemed a trespasser from the beginning on account of any irregularity afterwards committed by him, but the person aggrieved by such

irregularity may recover full satisfaction for the special damage (if any) in an action upon the case.

XVIII. And for the protection of persons acting in the execution of this act, be it enacted, that all actions and prosecutions to be commenced against any person for anything done in pursuance of this act shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such cause of action shall be given to the defendant one calendar month at the least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence, at any trial to be had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if upon demurrer or otherwise judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in any such action such plaintiff shall not have costs against the defendant, unless the judge before whom the trial is had shall certify his approbation of the action and of the verdict obtained thereupon.

Venue;

limitation of actions;

general issue;

tender of amends.

XIX. And be it enacted, that in every case of summary conviction before any justices of the peace under this act, in which the penalty adjudged to be paid shall be more than three pounds, any person who shall think himself aggrieved by the conviction may appeal to the justices of the peace at the next general or quarter sessions of the peace to be holden for the county, riding or division wherein the cause of complaint shall have arisen; provided that such person, at the time of the conviction, or within forty-eight hours thereafter, shall enter into a recognizance, with two sufficient sureties, conditioned personally to appear at the said sessions to try such appeal, and to abide the further judgment of the justices at such sessions assembled, and to pay such costs as shall be by the last-mentioned justices awarded; and it shall be lawful for the justices by whom such conviction shall have been made to bind over the witnesses who shall have been examined in sufficient recognizances to attend and be examined at the hearing of such appeal; and that every such witness, on producing a certificate of his being so bound, under the hand of the justices, shall be allowed com-

Appeal to quarter sessions.

7 Geo. 4, c. 64.

Powers of companies to be exercised by directors.

Act may be amended this session.

pensation for his time, trouble and expenses in attending the appeal, which compensation shall be paid, in the first instance, by the treasurer of the county or riding, in like manner as in cases of misdemeanor under the provisions of an act passed in the seventh year of the reign of king George the fourth, intituled "An Act for improving the Administration of Criminal Justice in England;" and in case the appeal shall be dismissed and the order or conviction affirmed, the reasonable expenses of all such witnesses attending as aforesaid, to be ascertained by the court, shall be repaid to the treasurer of the county or riding by the appellant.

XX. And be it enacted, that all the powers hereby vested in any company of proprietors of any such canal or navigable river may be exercised by the directors or committee of management, or other body or persons, under whatever style or name they may be known, duly authorized according to the constitution of such company to manage the affairs of such company respectively, and if there shall be no such body, or more than one such body, so that it may be doubtful by whom the said powers ought to be exercised, then by such body of persons as shall be appointed for that purpose by the proprietors at any general or special meeting of the proprietors convened for that purpose, with the like forms and notices as are required by law in each case respectively with regard to such meetings.

XXI. And be it enacted, that this act may be amended or repealed by any act to be passed in this session of parliament.



CANAL AND RIVER TOLLS ACT.

8 & 9 VICT. C. 28.

An Act to empower Canal Companies and the Commissioners of Navigable Rivers to vary their Tolls, Rates, and Charges on different Parts of their Navigations.

[30th June, 1845.]

WHEREAS by divers acts of parliament various canal companies and the commissioners or trustees of several navigable rivers have been authorized and empowered to levy and receive certain tolls, rates, and charges for the use of their respective canals and navigations, which tolls, rates, and charges are for the most part required to be levied at one uniform rate per ton or per mile

throughout the entire length of the said navigations and rivers respectively, without regard to any difference of circumstances which may exist in reference thereto: And whereas by an act of parliament passed in this present session, called "The Railways' Clauses Consolidation Act, 1845," powers have been given to railway companies to vary the tolls, rates and charges upon railways, so as to accommodate them to the circumstances of the traffic thereon; and whereas greater competition for the public advantage would be obtained if canal companies and the commissioners or trustees of navigable rivers which have already been or may hereafter be from time to time incorporated or established, or which are regulated under the authority of parliament, were to have the like powers granted to them in respect of their several canals and navigations and other works connected therewith; but such beneficial purposes cannot be effected without the authority of parliament: Be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act, and subject to the provisions and limitations herein contained, it shall be lawful for the company of proprietors of any canal, or for the undertakers, commissioners or trustees of any navigation or navigable river already or hereafter to be established or incorporated or which is regulated under the authority of parliament, or for their respective lessees, committees, directors or managers, or their superintendents, or other agents by them severally authorized, in such manner as may be required by their respective acts of incorporation or for regulating such canals or navigations, from time to time to alter or vary the tolls, rates and duties granted to them, or by them respectively authorized to be levied and received for the use of their several canals or navigations, or any branches therefrom, or any railways or tramways connected therewith, and made under the authority of such canal or navigation acts respectively, either upon the whole or upon or for any particular portion or portions of such canals, navigations, branches, railways, or tramways, according to local circumstances, or the quantity of traffic or otherwise, as they shall think fit, and also from time to time to lower or reduce, and again to raise or advance, such tolls, rates, and duties, and also any tolls or charges by them respectively authorized to be levied and received for any haulage, truckage, or other power supplied by them, either upon the whole or upon any particular portion or portions of their said several canals, navigations, branches, railways, and tramways, as to such companies, commissioners, trustees, or lessees, or their committees,

Canal companies authorized to vary their tolls or rates on different portions of their canals;

and also, from time to time, to reduce and again advance their tolls or rates.

directors, managers, or superintendents respectively, shall seem fit, any thing in the several acts of incorporation, or for regulating any such canals or navigations, contained to the contrary notwithstanding: Provided always, that in no case shall the tolls, rates, duties and charges to be at any time levied or made by any such companies, commissioners, trustees, or lessees, for the use of any such canals, navigations, branches, railways, or tramways, or for the supply of any such haulage, trackage, or other power, exceed the amount which they are by their said several acts respectively authorized to levy or receive.

Tolls to be charged equally to all persons under the like circumstances.

II. Provided always, and be it enacted, that all tolls, rates and duties for the use of any such canals, navigations, branches, railways or tramways shall be at all times charged equally to all persons, and after the same rate, whether per mile, or per ton per mile, or otherwise, in respect of all boats, barges and other vessels of a like description passing along or using the same portion of the said canal, navigation, branches, railways, or tramways respectively, and upon all goods, animals, articles and things of a like description, and conveyed or propelled in a like boat, barge, or other vessel passing along or using the same portion of the said canal, navigation, branches, railways, or tramways, under the like circumstances; and that all tolls and charges for haulage or trackage or other power, to be supplied by any such company, commissioners, trustees, or lessees, shall be at all times charged equally to all persons, and after the same rate, whether per mile or per ton per mile, or otherwise, in respect of all goods, animals, articles and things of a like description, and conveyed in a like boat or vessel drawn or propelled by a like power, and passing along or using the same portion of any such canal, navigation, branches, railways, or tramways, under the like circumstances; and no reduction or advance in any tolls or charges for the use of any such canal, navigation, branches, railways, or tramways, or for the supply of any haulage, trackage or other power by the said companies, commissioners, trustees or lessees, shall be made, either directly or indirectly, in favour of or against any particular company or person passing along or using the same portion of such canal, navigation, branches, railways, or tramways.

Act not to apply to existing companies until a meeting of shareholders have determined thereupon, nor in other cases until approved by trustees or proprietors, and notices thereof duly published.

III. Provided always, and be it enacted, that this act shall not apply to any canal or navigation, the property wherein is vested in shareholders, until a meeting of the shareholders thereof shall have been duly convened, in such manner as meetings are by their respective acts of incorporation or settlement required to be called, or are usually called, and it shall have been determined, by a majority of two thirds of the votes of the shareholders in such

meeting assembled, either in person or by proxy (where by such acts of incorporation or settlement voting by proxy is allowed), to adopt the powers hereby granted, and where such navigations are vested in commissioners or trustees, without any body of shareholders or proprietors, until a special meeting of such commissioners or trustees shall have been duly convened in such manner as special meetings are by the respective acts for regulating such navigations required to be called, or are usually called, and it shall have been determined by a majority of such commissioners or trustees in such meeting assembled to adopt the powers by this act granted, or to any canal or navigation the property wherein is vested in one or more owner or owners, proprietor or proprietors, unless the owner or owners, proprietor or proprietors thereof shall determine to adopt the powers and provisions hereby granted, nor in either case until public notice of such determination and intention shall have been inserted in the London Gazette in respect of canals or navigations in England or Wales, in the Edinburgh Gazette in respect of canals or navigations in Scotland, and in the Dublin Gazette in respect of canals or navigations in Ireland, and in some newspaper circulating in the county or counties wherein such canal or navigation, or some part thereof, shall pass, one month at the least previously to the exercise of such powers, whereupon, or immediately after the expiration of such notice, every such company, and all such commissioners, trustees, or lessees, owners and proprietors, or their respective committees, directors, or managers, or their agents by them duly authorized in manner aforesaid, may from time to time put in force and exercise the said powers, or any of them, in the manner by this act authorized.

IV. Provided always, and be it enacted, that nothing in this act contained shall be deemed or construed to deprive any canal or navigation company, or the commissioners, trustees, undertakers, or proprietors of any canal, river, or navigation, or the owners, lessees or occupiers of any lands, collieries, quarries, or other hereditaments adjoining or near to any of such canals or navigations, or the overseers or surveyors of the roads of any parish, township, or hamlet through which any such canal or navigation may pass; of any powers, rights, privileges, exemptions, or advantages specifically and expressly secured to them by any existing act of parliament: provided also, that where by any canal or navigation act or acts now passed the tolls, rates, or duties (whether tolls per mile or tolls in gross) upon any description of goods, animals, articles, or things, or upon any boats, barges or other vessels which shall be navigated, carried or conveyed along any canal or navigation, or any portion thereof, and which shall pass into, out of, or along

Saving rights specifically reserved to canal companies and others by existing acts of parliament.

any such canal or navigation, or any portion thereof, from, into or along any other canal or navigation, canals or navigations, adjoining or communicating therewith, or any portion thereof, or from or to the junction or junctions with any such adjoining or communicating canal or navigation, canals or navigations, are or shall be specially fixed, determined, or limited, either absolutely, or with reference to the tolls, rates or duties to be levied or received from time to time on goods, animals, articles, or things, boats, barges or other vessels passing into, out of, or along such canal or navigation, or any portion or portions thereof respectively, from, into, or along any other adjoining or communicating canal or navigation, canals or navigations, or from or to the junction or junctions with such other adjoining or communicating canal or navigation, canals or navigations; or where in any such act or acts any special enactment or provision shall have been inserted for securing a rateable reduction or advance of the respective tolls, rates or duties to be levied or received from time to time on goods, animals, articles, or things, boats, barges, or other vessels, or on goods, animals, articles, or things of the same description, passing over, along, into, or from any canal or navigation, or several and distinct portions of any canal or navigation, into or along two or more adjoining or communicating canals or navigations, or from or to the respective junctions of two or more adjoining or communicating canals or navigations, no alteration or variation of the tolls, rates and duties so specially fixed, determined or limited, or any or either of them, other than such alterations or variations as are respectively authorized to be made under the several acts for regulating such canals or navigations, shall be made under the authority of this act, without the previous consent in writing of the proprietors, trustees, undertakers or commissioners of the canal or navigation, or of all the several canals or navigations who are expressly mentioned in such special enactments or provisions, or of the committee, directors or managers of the company, trustees, undertakers, or commissioners, or respective companies, trustees, undertakers or commissioners of such canal or navigation, canals or navigations, which consents such companies, trustees, undertakers, and commissioners, or their respective committees, directors, or managers, are hereby authorized to give, either under their common seals respectively, or under the hand of their respective clerks or secretaries, although any such companies, trustees or undertakers so consenting may not have adopted the other powers of this act.

Canal companies
subject to a limitation of profits

V. Provided also, and be it enacted, that where in any canal or navigation act there shall have been inserted any special provision,

which shall be still in force and unrepealed, whereby the amount of the annual dividends, interest or profits to be shared or divided amongst the proprietors or shareholders of such canal or navigation shall have been limited not to exceed a certain per-centage or amount, and the maximum of such per-centage or amount shall have been attained at the time of the passing of this act, it shall not be lawful for the company of proprietors, trustees or undertakers of any such canal or navigation to avail themselves of any of the powers of this act for the purpose of raising or increasing the tonnage rates, tolls or duties which on the first day of January immediately before the passing of this act were charged or levied upon any boats, barges or other vessels carried upon or passing along such canal or navigation, or any part thereof.

not to raise their dues so as to exceed the maximum of profits.

VI. And be it enacted, that nothing herein contained shall be construed to exempt any canal or navigation company who shall adopt the powers of this act from the operation of any general act regulating the manner of charging tolls and other charges upon canals and navigations in respect of passengers, goods, animals, articles, and things of a like description, which may be passed in the course of any future session of parliament.

Nothing herein to exempt any canal, &c. from any general act.

VII. And be it enacted, that this act may be amended or repealed by any act to be passed in this present session of parliament.

Act may be amended, &c.

CANAL COMPANIES ACT.

8 & 9 VICT. C. 42, ss. 8—13 (a).

An Act to enable Canal Companies to become Carriers of Goods upon their Canals. [21st July, 1845.]

VIII. And be it enacted, that it shall be lawful for any such canal or navigation company, from time to time, by lease, to take effect in possession within six months from the letting thereof, to let the tolls and duties or any part thereof, upon the whole or any part of any such canal or navigation, or of any such railways or tramways, to any other canal or navigation company (and which lease such other canal or navigation company is hereby authorized to accept and enter into), for any period not exceeding twenty-one years from the commencement of any such lease: provided always, that no such letting shall take place unless public notice of the in-

Canal companies empowered to lease their tolls.

[(a) For earlier sections, see p. 323—326.]

tention to let such tolls, or the part thereof intended to be let, shall have been given by the company proposing to let the same, by advertisement, at least fourteen days prior to the meeting of the directors or managers at which it shall be intended to let such tolls.

Lessees to be deemed collectors.

IX. And be it enacted, that during the continuance of any such lease the respective lessees named therein, and also all persons appointed by them to collect the tolls so let, shall be deemed collectors of the tolls so let, and they shall have the same powers to collect and recover such tolls, and be subject to the same rules, duties, and penalties in reference thereto, as if they had been appointed for that purpose by the company demising the same.

Lessee making default to be removed.

X. And be it enacted, that if any such lease shall become void or voidable, according to any stipulations therein contained for that purpose, by reason of the failure on the part of the lessee to comply with any of the terms of such lease, or if all or any part of the rent thereby reserved shall be in arrear or unpaid for twenty-one days after the same shall become payable, then, upon application made by the company who shall have demised the same, to a justice, it shall be lawful for such justice to order any constable, with proper assistance, to enter upon any toll house, dwelling house, office, weighing machine, or other building, with the appurtenances, belonging to the lessors, and remove from the same the lessee or collector or other person found therein, together with his goods, and take possession thereof and of all property found therein belonging to the lessors, and deliver the same to them or any person appointed by them for that purpose.

Power to re-let tolls.

XI. And be it enacted, that upon such possession being obtained it shall be lawful for the company having made such demise to determine the lease (if any) previously subsisting, and the same shall accordingly be utterly void, except as to the remedies of the lessors for payment of the rent due, or in respect of any unperformed or broken obligations or conditions on the lessee's part, all which remedies shall remain in full force; and in every such case, either during such proceedings or on the termination thereof, the company may again let the tolls to the same or any other person, or cause them to be collected in the same manner as if no such former lease had been made relative thereto.

Act not to apply to canals vested in shareholder, until approved of at a meeting, or in other cases by proprietors, and notices inserted in Gazettes, &c.

XII. Provided always, and be it enacted, that this act shall not apply to any canal or navigation the property wherein is vested in shareholders, nor shall the powers of leasing hereinbefore contained be exercised by any such canal or navigation company, until a meeting of the shareholders thereof shall have been duly convened in such manner as meetings are by their respective acts of incorporation or settlement required to be called or are usually called,

and it shall have been determined by a majority of two thirds of the votes of the shareholders in such meeting assembled, either in person or by proxy, where by such acts of incorporation or settlement voting by proxy is allowed, to adopt the powers and provisions hereby granted, or such and so many of them as it shall at such meeting be determined shall be adopted, or to grant or accept any such lease, nor to any canal or navigation the property wherein is vested in one or more owner or owners, proprietor or proprietors, unless the owner or owners, proprietor or proprietors thereof shall determine to adopt the powers and provisions hereby granted, nor in either case until public notice of any such determination and intention shall have been inserted in the London Gazette in respect of canals or navigations in England or Wales, in the Edinburgh Gazette in respect of canals or navigations in Scotland, and in the Dublin Gazette in respect of canals or navigations in Ireland, and in some newspaper circulating in the county or counties wherein such canal or navigation, or some part thereof, shall pass, one month at the least previously to the exercise of any such powers, whereupon, or immediately after the expiration of such notice, every such company, or their respective committees, directors, or managers, or their agents by them duly authorized in manner aforesaid, may from time to time put in force and exercise the said powers or any of them, in the manner by this act authorized.

XIII. And be it enacted, that nothing herein contained shall be construed to exempt any canal or navigation company who shall adopt the powers of this act from the operation of any general act regulating the manner of charging tolls and other charges upon canals or navigations in respect of passengers, goods, animals, articles, and things of a like description, which may be passed in the course of any future session of parliament.

Act not to exempt canal companies from any general act.

RAILWAYS ACT.

21 & 22 VICT. c. 75 (a).

An Act to amend the Law relating to Cheap Trains, and to restrain the Exercise of certain Powers by Canal Companies being also Railway Companies.

[2nd August, 1858.]

“ WHEREAS by the act passed in the session of parliament held in the seventh and eighth years of the reign of her present Majesty, 7 & 8 Vict. c. 85.

(a) Made perpetual by 23 & 24 Vict. c. 41.

A A

8 & 9 Vict. c. 42.

For fractions under one mile one penny may be charged, and for fractions exceeding half a mile, where the distance amounts to one mile or more, one half-penny may be charged.

Rates heretofore charged not exceeding those allowed by this clause not to be deemed excessive.

Canal companies, being also railway companies, not to take leases of canals unless specially authorized.

Act to be in force for one year.

chapter eighty-five, section six, it is enacted, amongst other things, with respect to the cheap trains thereby required to be provided in certain cases, that the fare or charge for each third-class passenger by any such train shall not exceed one penny for each mile travelled: and whereas it is expedient to amend the said act in manner hereinafter mentioned: and whereas it is also expedient to amend the act passed in the ninth year of the reign of her present majesty, chapter forty-two, intituled 'An Act to enable Canal Companies to become Carriers of Goods upon their Canals,' by restraining as hereinafter mentioned the exercise of certain powers therein contained:" be it enacted as follows:

I. When the distance travelled by any third-class passenger by any train run in compliance with the provisions relating to cheap trains contained in the said act of the seventh and eighth of Victoria, chapter eighty-five, is a portion of a mile, and does not amount to one mile, the fare for such portion of a mile may be one penny, or when such distance amounts to one mile, or two or more miles, and a portion of another mile, the fare or charge for such portion of a mile, if the same amounts to or exceeds one half mile, may be one-halfpenny: provided always, that for children of three years and upwards, but under twelve years of age, the fare or charge shall not exceed half the charge for an adult passenger.

II. After the passing of this act, no fare heretofore charged to or received from any third-class passenger by any such train as aforesaid shall, in any proceeding to be hereafter instituted, be deemed to have exceeded the rate prescribed in such case by the said act of the seventh and eighth of Victoria, chapter eighty-five, if the same shall not have exceeded the rate of one farthing for each entire quarter of a mile travelled.

III. Notwithstanding anything contained in the said recited act of the ninth year of her Majesty, it shall not be lawful for any canal or navigation company, being also a railway company, or entitled to work any railway constructed under the authority of any act of parliament, hereafter to accept a lease of the whole or any part of the undertaking of any other railway and canal company, or of any canal or navigation company, or of the tolls, dues, or charges upon or in respect of the whole or any part of any such undertaking, except under the powers of some act or acts heretofore passed or to be hereafter passed in which the parties to any such lease shall be specifically named and authorized to enter into the same.

IV. This act shall continue in force for one year next after the passing thereof, and thence to the end of the then next session of parliament.

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TO THE QUEEN'S MOST EXCELLENT MAJESTY
AND TO
H.R.H. THE PRINCE OF WALES.

"Now for the Laws of England (if I shall speak my opinion of them without partiality either to my profession or country), for the matter and nature of them, I hold them wise, just and moderate laws: they give to God, they give to Cæsar, they give to the subject what appertaineth. It is true they are as mixt as our language, compounded of British, Saxon, Danish, Norman customs. And surely as our language is thereby so much the richer, so our laws are likewise by that mixture the more complete."—LORD BACON.

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